Supreme Court, U.S.
FILED
JUL 22 2010
OFFICE OF THE CLERK

No. 10-___

10-130

IN THE

Supreme Court of the United States

ZHAN GAO,

Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A non-citizen is ineligible for withholding of removal under 8 U.S.C. § 1231(b)(3)(B)(ii) or asylum under 8 U.S.C. § 1158(b)(2)(A)(ii) if the Attorney General determines that the individual has been convicted of "a particularly serious crime" and constitutes "a danger to the community." With respect to withholding of removal, an "aggravated felony . . . for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years" constitutes a "particularly serious crime," but the Attorney General may waive the five-year requirement. *Id.* § 1231(b)(3)(B). With respect to asylum, an "aggravated felony" is "a particularly serious crime"; moreover, the Attorney General may also "designate" additional offenses "by regulation." *Id.* § 1158(b)(2)(B)(ii).

The questions presented are:

1. Is the category of "particularly serious crimes" limited to "aggravated felonies," with the sole exception that – with respect to asylum – the Attorney General may "designate" additional offenses "by regulation"? (This Court granted certiorari to resolve the circuit conflict over whether, for purposes of withholding of removal, "particularly serious crimes" are limited to "aggravated felonies" in *Ali v. Achim*, 551 U.S. 1188 (2007), but that case was voluntarily dismissed by the parties before a ruling on the merits, 552 U.S. 1085 (2007).)

2. Must the government make an individualized determination that an individual poses "a danger to the community" before denying her withholding of removal or asylum under 8 U.S.C. § 1231(b)(3)(B) (for

withholding) or 8 U.S.C. § 1158(b)(2)(A)(ii) (for asylum)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Zhan Gao respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying the petition for rehearing and rehearing en banc (Pet. App. 1a) is unpublished. The panel decision (Pet. App. 2a-18a) is reported at 595 F.3d 549. The opinions of the Board of Immigration Appeals (Pet. App. 19a-46a) are unpublished. The relevant opinions of the Immigration Judge (Pet. App. 47a-151a) are unpublished.

JURISDICTION

The opinion and judgment of the court of appeals were filed on February 23, 2010. The order denying petitioner's timely petition for rehearing en banc was entered on April 23, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1231 of Title 8 of the United States Code provides in relevant part:

(b) Countries to which aliens may be removed

. . . .

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that –

. . .

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States

. . .

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

Section 1158 of Title 8 of the United States Code provides in relevant part:

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) of this title.

. . . .

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that –

. . .

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States

. . . .

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a

crime described in clause (ii) or (iii) of subparagraph (A).

STATEMENT OF THE CASE

An immigration judge granted petitioner, a Chinese national, withholding from removal and asylum. The Board of Immigration Appeals (BIA) and the Fourth Circuit, however, held that she was ineligible to remain in the United States because her conviction for violating U.S. export laws constituted a "particularly serious crime" under federal law notwithstanding that export violations do not qualify as "aggravated felonies." This Court previously granted certiorari to resolve the circuit conflict over the question whether crimes that are not aggravated felonies can constitute "particularly serious crimes" for purposes of withholding of removal, in *Ali v. Achim*, 551 U.S. 1188 (2007), but the parties resolved the case, 552 U.S. 1085 (2007).

Moreover, the BIA and the Fourth Circuit also held that a conviction alone stripped an individual of eligibility for withholding of removal or asylum without regard to whether the individual poses a danger to the community. This conclusion conflicts with both the plain text of the statute and with the decisions of courts in other countries that have considered the question.

1. **Statutory Framework.**

a. Withholding of Removal. The government may not remove a non-citizen to another country if she can show that it is "more likely than not" that her "life or freedom would be threatened in such country" because of her "race, religion, nationality, membership in a particular social group, or political

opinion." *INS v. Stevic*, 467 U.S. 407, 411, 429-30 (1984).[1] However, the remedy is not available if the Attorney General determines that the non-citizen, "having been convicted by a final judgment of a particularly serious crime is a danger to the community." 8 U.S.C. § 1231(b)(3)(B)(ii). Congress defined "particularly serious crime" as follows:

> [A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3)(B).

Federal law defines an "aggravated felony" to include a broad array of offenses, such as murder, rape, drug trafficking, weapons trafficking, racketeering, running a prostitution business, and burglary. 8 U.S.C. § 1101(a)(43).

The position of the BIA – based on what it regards as "a plain reading of the Act" – is that "the statute does not require an offense to be an aggravated felony in order for it to be considered a

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[1] The non-citizen may, however, be removed to a third country in which she will not face persecution. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

particularly serious crime." *In re N-A-M-*, 24 I. & N. Dec. 336, 338 (2007). Further, in the view of the BIA, the Attorney General need not make an individualized determination that the non-citizen in fact represents a "danger to the community"; instead, she may rely on a categorical judgment about certain categories of crimes. *Id.* at 342.

b. Asylum. A non-citizen may also pursue the broader remedy of asylum, which prohibits the individual's removal to any country. Unlike withholding from removal, asylum is a discretionary, rather than mandatory, remedy. 8 U.S.C. § 1158(b)(1)(A).

A non-citizen is eligible for asylum if she can show either that she has in the past been persecuted on account of a protected ground – such as race, religion, nationality, membership in a particular social group, or political opinion – or that she has a "well-founded fear" of future persecution. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). As with withholding of removal, a non-citizen is ineligible for asylum if the Attorney General determines that she, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A)(ii).

The asylum statute defines "particularly serious crimes" more broadly than the statute governing withholding of removal: a non-citizen who has "been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." *Id.* § 1158(b)(2)(B)(i). Further, the Attorney General may "designate by regulation offenses that will be considered to be a [particularly serious] crime." *Id.* § 1158(b)(2)(B)(ii).

2. Factual Background. Petitioner Zhan Gao was born in the People's Republic of China and became a legal permanent resident of the United States in 1993. In 2001, Gao traveled to China with her husband and young son. As the family prepared to leave China in February 2001, Gao was detained by Chinese authorities, who held her under harsh conditions and interrogated her repeatedly for long periods of time for several months. In June 2001, she stood trial on charges that she had "spied" for Taiwan by taking three documents designated as "internal" out of China. Pet. App. 4a. Gao's trial – which the State Department has characterized as "notably lacking in due process," *id.* 75a – lasted just three hours, after which she was convicted and sentenced to ten years in prison, *id.* 62a-63a.

The Chinese government's treatment of Gao drew criticism from the U.S. government, with both President George W. Bush and Secretary of State Colin Powell speaking out on her behalf. Pet. App. 117a. Shortly after her conviction, Gao was released on "medical parole." *Id.* 4a. As a condition of her release, Gao was required to "sign a paper . . . stating that she would not speak to anybody about what had happened." *Id.* 62a. However, upon her return to the U.S., Gao made speeches and published articles critical of the Chinese government. *Id.*

Before Gao left for China, U.S. customs officials had received a complaint that she had been exporting computer equipment to China without a license. *See* Pet. App. 4a. Upon her return, Gao cooperated with the ensuing investigation, including by providing the government with information about others exporting illegally to China. *Id.* 5a, 65a.

In November 2003, Gao pleaded guilty to one count of tax fraud and one count of unlawful export of Commerce Control List items, Pet. App. 34a, arising out of her shipments to China of microprocessors that have both commercial and military uses, *id.* 113a.

At sentencing, U.S. District Judge T.S. Ellis found that Gao was entitled to a downward departure based on the substantial assistance that she had provided to the government. Pet. App. 122a. He sentenced her to seven months in prison and eight months of community confinement, *id.* 123a, which he delayed to allow her to nurse her infant son, *id.* 111a.

3. Immigration Proceedings. In 2005, after Gao completed her prison sentence, the Department of Homeland Security began proceedings to remove her from the United States. Immigration Judge Paul Wickham Schmidt found her removable on the ground that her export control and tax fraud convictions constituted crimes involving moral turpitude. Pet. App. 130a.

Judge Schmidt held, however, that petitioner was entitled to asylum, withholding of removal, and, alternatively, deferral of removal under the Convention Against Torture. Pet. App. 127a-28a. Judge Schmidt concluded that Gao's crimes were not "particularly serious crimes" that would disentitle her to withholding of removal or asylum because they were "closer to the types of non-violent 'white collar' crime that generally have been found not to be particularly serious than [they were] to the types of violent or potentially violent crimes against individuals or drug trafficking which generally have been found to be particularly serious." *Id.* 149a-50a.

Also before Judge Schmidt was a letter from Paul McNulty, who served as the U.S. Attorney for the Eastern District of Virginia at the time of Gao's conviction. Pet. App. 109a-10a. Mr. McNulty recommended that Gao be allowed to remain in the United States because she "provided 'substantial assistance' in the investigation of others who had committed crimes." Although his recommendation was not binding, Mr. McNulty nevertheless "entreat[ed] the DHS not to deport [petitioner.]" *Id.* 110a. The FBI also wrote a confidential letter regarding Gao's cooperation that was given to Mr. McNulty, who transmitted it to Judge Ellis. *Id.* 122a.

Relying in part on Mr. McNulty's letter, Pet. App. 109-10a, Judge Schmidt concluded that "the public interest would best be served by giving the respondent a chance to make good on her promise to redeem herself and live a worthy future life. I believe that [she] can and will achieve this potential." *Id.* 100a-01a. Judge Schmidt reasoned that Gao – whose husband and three young children are all U.S. citizens, *id.* 100a – had "learned her lesson" and "now seeks to enter the United States exclusively to care for her family and to support herself and her family through honest work," *id.* 128a. He further found that "there is not a reasonable possibility that [Gao] will resume her unlawful trade activities." *Id.*

The Department of Homeland Security appealed Judge Schmidt's determinations that Gao was eligible for asylum and withholding of removal to the Board of Immigration Appeals (BIA). The BIA reversed. It deemed Gao to be barred from asylum and withholding as a matter of law because her unlawful export conviction was a "particularly

serious crime." *See* Pet. App. 43a. The BIA initially agreed with Judge Schmidt "that an unlawful export conviction is not presumptively a particularly serious crime." *Id.* 40a. However, following its practice of determining whether a conviction is a particularly serious crime "on a case-by-case basis," it nonetheless concluded that "the national security implications of the respondent's offense render it a particularly serious crime." *Id.*

Instead of considering the full range of evidence relevant to whether Gao posed a danger to the community in the future, the BIA concluded that "the conviction itself is the sole determinative factor for whether an alien represents a 'danger to the community.'" Pet. App. 43a. The BIA explained that Judge Schmidt should not have considered the specific facts relevant to Gao's risk of recidivism – for example, that she was no longer operating her export business – because as a matter of law such considerations "ha[ve] no bearing on the question of whether she is a danger to the community for purposes of the Act." *Id.*

Gao filed a motion to reconsider, challenging the BIA's determination that her export conviction was a particularly serious crime barring her from asylum and withholding. In September 2007, the BIA issued an opinion rejecting Gao's arguments.[2]

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[2] For its part, DHS did not appeal Judge Schmidt's ruling that Gao is entitled to deferral of removal under the Convention Against Torture, and that ruling is not at issue here. Pet. App. 7a. DHS did successfully seek reconsideration of the BIA's ruling on a separate question: the BIA's finding that Gao was

4. Petition for Review. Gao sought review of the BIA's decision in the Fourth Circuit, which affirmed the BIA's ruling that she was not eligible for either withholding or asylum. Pet. App. 3a. The court of appeals rejected Gao's argument that, for purposes of withholding of removal, the universe of "particularly serious crimes" is limited to "aggravated felon[ies]" – a category that would exclude her export control conviction. *Id.* The panel concluded that BIA's contrary view represents a reasonable interpretation of an ambiguous statute, which is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court of appeals reasoned that "[t]he statute does not declare that some categories of crimes may not be considered particularly serious. Instead, it creates a per se rule that some aggravated felonies must be considered particularly serious and then leaves it up to the Attorney General to 'decide[]' whether other crimes are as well." Pet. App. 10a-11a.

The panel next turned to, and rejected, Gao's related argument that, for purposes of asylum, "particularly serious crimes" are limited to aggravated felonies and the further list of offenses that the Attorney General has "designate[d]" as particularly serious "by regulation." 8 U.S.C. § 1158(b)(2)(B)(ii). The panel opined that "nothing in the statute says that the Attorney General must use

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not inadmissible because she was not seeking to enter the United States to engage in illegal exports. *Id.* 6a. The Fourth Circuit declined to decide this issue, *id.* 17a-18a, which would remain open on remand if Gao were to prevail in this Court.

regulation to designate crimes as particularly serious"; rather, it reasoned, because the word "may" is a permissive verb, Pet. App. 14a, the statute simply authorizes the Attorney General to designate other, non-aggravated felonies as "particularly serious" by regulation if he so chooses, *id.*

Finally, the panel rejected Gao's argument that the Board erred in treating her as statutorily barred from withholding of removal and asylum without first determining, on the facts of her case, that she constitutes a danger to the community. Pet. App. 12a n.1. The panel deemed it "well settled in this circuit that 'once the particularly serious crime determination is made, the alien is ineligible for withholding without a separate finding on dangerousness.'" *Id.* (quoting *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (en banc)).

Gao's petition for rehearing en banc was denied. Pet. App. 1a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. Certiorari Is Warranted To Determine The Scope Of "Particularly Serious Crimes" That Render A Non-Citizen Ineligible For Withholding Of Removal And Asylum.

A. This Court Should Take This Opportunity To Resolve The Question On Which It Granted Certiorari In *Ali*.

Congress provided that a non-citizen is ineligible for withholding of removal if the Attorney General determines that the individual, "having been convicted by a final judgment of a particularly

serious crime is a danger to the community." 8 U.S.C. § 1231(b)(3)(B)(ii). Congress specified that

> an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3)(B)(iv).

There is a widely acknowledged circuit split over whether the statute limits the category of "particularly serious crimes" to "aggravated felonies." This Court granted certiorari in *Ali v. Achim*, 551 U.S. 1188 (2007), to resolve that conflict but was unable to decide the question after the parties voluntarily withdrew that case. Certiorari is warranted to decide that question here.

1. The Courts Of Appeals Remain Irreconcilably Divided.

As the Attorney General acknowledged in his brief below, the circuits are divided on this important question. *See* Resp. C.A. Br. 29-30 (citing *Alaka v. Attorney General*, 456 F.3d 88 (3d Cir. 2006), as "reaching a contrary result" from *Ali*).

a. The Fourth Circuit joined four other courts of appeals in holding that that, for purposes of withholding of removal, the category of "particularly

serious crimes" is not limited to aggravated felonies. But although they reach the bottom line favored by the BIA, these circuits reject the BIA's view that its position is compelled by the plain language of the statute. Instead, these courts regard the statutory language as ambiguous and defer to the agency's interpretation. *See* Pet. App. 9a-10a; *N-A-M v. Holder*, 587 F.3d 1052, 1056 (10th Cir. 2009);[3] *Delgado v. Holder*, 563 F.3d 863, 867 (9th Cir. 2009); *Nethagani v. Mukasey*, 532 F.3d 150, 156-57 (2d Cir. 2008); *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006).

2. By contrast, in the Third Circuit, petitioner's export control conviction would not constitute a particularly serious crime for purposes of withholding of removal. In *Alaka*, that court held that "[t]he plain language and structure (i.e., context) of the statute indicate that an offense must be an aggravated felony to be sufficiently 'serious.'" 456 F.3d at 104.

In reaching its decision, the Third Circuit relied on a close textual analysis of the definitional paragraph of Section 1231(b)(3)(B). "The second sentence" of that section – which permits the Attorney General to designate aggravated felonies giving rise to prison terms of less than five years as "particularly serious crimes" – "explicitly" is "tied to the first." 456 F.3d at 104. Because the first sentence includes only aggravated felonies in its

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[3] On June 21, 2010, Justice Sotomayor extended the time for N-A-M to file a petition for certiorari to and including July 29, 2010. App. 09A1233. On July 9, 2010, Justice Sotomayor stayed N-A-M's removal pending the filing and disposition of her petition. App. 10A16.

definition of particularly serious crimes, the Attorney General's authority to designate crimes as "particularly serious" must also be "limited to aggravated felonies." *Id.* at 104-05.

3. This Court's intervention is required because the conflict is entrenched. Although its opinion predated the BIA's decision in *N-A-M-*, there is no reason to believe that the Third Circuit will reverse course. The Third Circuit did not find any ambiguity in the statute. Rather, it determined that the "plain language and structure" of the statute compelled its decision. This reasoning precludes the Third Circuit from deferring to the BIA's decision in *N-A-M-*. *Cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.").

Two recent decisions of the Third Circuit reinforce that conclusion by treating *Alaka* as good law. *See Quiceno v. Attorney Gen. of the United States*, 304 Fed. Appx. 40, 43 (3d Cir. 2008) ("In the withholding of removal context, a particularly serious crime is an aggravated felony for which the alien was sentenced to five years imprisonment or an aggravated felony that the Attorney General deems a particularly serious crime." (citing *Alaka*)); *Hussein v. Attorney Gen. of the United States*, 273 Fed. Appx. 147, 152 (3d Cir. 2008) ("In *Alaka*, 456 F.3d at 104-05, we held that an offense must be an aggravated felony to be considered a 'particularly serious' crime . . . .").

The five circuits on the other side of the conflict are equally intractable: in holding that "particularly

serious crimes" are not limited to aggravated felonies, four expressly acknowledged the Third Circuit's contrary holding in *Alaka*. *See* Pet. App. 10a; *N-A-M*, 587 F.3d at 1056; *Delgado*, 563 F.3d at 867; *Nethagani*, 532 F.3d at 156. There is no prospect that the division will resolve itself, as three circuits have denied rehearing en banc. *See* Pet. App. 1a; *N-A-M v. Holder*, Nos. 07-9580 and 08-9527 (10th Cir. Mar. 31 2010) (order denying rehearing en banc); *Ali v. Achim*, 2007 U.S. App. LEXIS 642 (7th Cir. Jan. 5, 2007) (en banc).

2. The Withholding Statute Limits Particularly Serious Crimes To Aggravated Felonies.

Only the Third Circuit's interpretation of the definition of aggravated felony properly accounts for the unambiguous language of the withholding provision, the structure of the statute as a whole, and Congress's intent. Moreover, interpreting "particularly serious crimes" as limited to aggravated felonies best comports with the interpretative framework of the immigration rule of lenity and the *Charming Betsy* canon. Finally, because the text of the statute is clear, the BIA's contrary decision in *In re N-A-M-*, 24 I. & N. Dec. 336, 337 (2007), is not entitled to deference.

1. The definitional paragraph of the statutory provision governing withholding of removal provides:

> [A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous

> sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3)(B)(iv).

Properly understood, Congress both specified a default category of specified crimes (aggravated felonies that gave rise to a prison term of at least five years) and provided a carefully defined authority for the Attorney General to expand that category (by waiving the five-year requirement). Congress notably did *not* authorize the Attorney General to take the far more significant step of waiving the requirement that the non-citizen have been convicted of an "aggravated felony" in the first place.

Under the canon of *expressio unius est exclusio alterius*, "expressing one item of [an] associated group or series excludes another left unmentioned." *United States v. Vonn*, 535 U.S. 55, 65 (2002). Moreover, the definitional paragraph must "be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009). Reading the statute to permit the Attorney General to designate any crime as particularly serious, even if it was not an aggravated felony, would strip the statute's "notwithstanding the length of the sentence imposed" clause of all meaning.

The same conclusion follows by contrasting the just-discussed definition of "particularly serious crime" in the statutory provision governing withholding of removal with the definition of the

same term in the parallel provision governing asylum. With respect to asylum, Congress not only designated aggravated felonies as particularly serious crimes (as with respect to withholding), but it also expressly granted the Attorney General the power to designate additional offenses as "particularly serious" by regulation. 8 U.S.C. § 1158(b)(2)(B)(ii). That stark contrast is telling: because the statutory provision governing withholding omits the explicit authority to specify additional particularly serious crimes that is given to the Attorney General for cases involving asylum, the withholding provision cannot fairly be read to provide that sweeping authority implicitly. Not only is it a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), but it is "generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted).

2. Restricting the definition of "particularly serious crime" to "aggravated felonies" is also compelled by Congress's purpose in enacting the provisions governing withholding of removal. Congress initially enacted those provisions in the Refugee Act of 1980[4] – which amended the

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[4] This change was originally codified at 8 U.S.C. § 1253(h), and was later renumbered as 8 U.S.C. § 1231(b)(3)(A).

Immigration and Nationality Act – to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). To that end, it enacted the "particularly serious crime" exception to the withholding statute, specifying that this exception in particular was "based directly upon the language of the Protocol" and should be "construed consistent with" it. H.R. Rep. No. 96-781, at 20 (1980). The BIA itself recognized that even Congress's more recent adoption of the amended definition of "particularly serious crime" reflects a determination "to ensure that the refoulement [*i.e.*, return] of a particular criminal alien would not place our compliance with the Protocol in jeopardy." *In re Q-T-M-T-*, 21 I. & N. Dec. 639, 648 (1996). *Cf. Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) ("If a word is obviously transplanted from another legal source . . . it brings its own soil with it.") (internal citation omitted).

It is accordingly significant that the Protocol limits "particularly serious crimes" to truly heinous offenses. For purposes of withholding of removal ("non-refoulement" in the terminology of the Protocol), a "serious" crime "must be a capital crime or a very grave punishable act." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 155, U.N. Doc. HCR/1P/4/Eng/Rev.2 (1979) (re-edited 1992); *see also Cardoza-Fonseca*, 480 U.S. at 439 n.22 ("[T]he Handbook provides significant guidance in construing the Protocol."). As the BIA itself has

acknowledged, a "*particularly* serious crime" *ipso facto* must be "more serious" than a capital crime or a very grave punishable act. *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (1982) (emphasis added).

Even had Congress not plainly expressed, in both the text and history of the statute, its intention to comply with the 1967 Refugee Protocol, the *Charming Betsy* canon (*see Murray v. The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64 (1804) (U.S. statutes should be construed so as not to violate international law if any other construction is possible)) would require courts to construe the statute consistently with the Protocol because "[b]oth the Refugee Convention and the Protocol serve as evidence of customary international law." Marra Guttenplan, *Granting Asylum to Persecuted Afghan Western Women*, 12 Cardozo J. L. & Gender 391, 393 n.17 (Fall 2005); *see also* Alex O. Canizares, *Is Charming Betsy Losing Her Charm? Interpreting U.S. Statutes Consistently With International Trade Agreements and the* Chevron *Doctrine*, 20 Emory Int'l L. Rev. 591, 609-11 (Fall 2006) (using *Cardoza-Fonseca*'s analysis of the Protocol as evidence "that *Chevron* is limited by *Charming Betsy*"). Similarly, courts must also construe statutes to avoid violating treaties, like the Protocol, to which the U.S. is a party. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("'A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.' *Cook v. United States*, 288 U.S. 102, 120 (1933).").

The restrictive interpretation of "particularly serious crime" adopted by the Third Circuit finds

additional support in the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449; *see also INS v. Errico*, 385 U.S. 214, 225 (1966). In the immigration context, a non-citizen should be clearly on notice that her actions will lead to deportation. *See James v. United States*, 550 U.S. 192, 219 (2007) (noting that "[t]he rule of lenity" is "grounded in part on the need to give 'fair warning' of what is encompassed by a criminal statute" (internal quotations omitted)).

This principle has special force here. The government's position in this case is that the Attorney General may declare any non-citizen ineligible for asylum and withholding of removal if she has committed *any* crime, even if the immigration laws do not reference that crime and the Attorney General has never before taken the position that the offense in question implicates withholding of removal or asylum.

Notice of deportation consequences is especially important in cases – such as petitioner's – involving a plea bargain. As this Court recently acknowledged in *Padilla v. Kentucky*, for many non-citizens facing criminal charges, "preserving the [] right to remain in the United States may be more important to the client than any potential jail sentence." 130 S. Ct. 1473, 1483 (2010) (citing *INS v. St. Cyr*, 533 U.S. 289, 296 (2001)). Thus, both non-citizens and prosecutors need to be aware of the immigration consequences of different crimes so that they can "reach [plea] agreements that better satisfy the interests of both parties." *Id.* at 1486.

4. The Fourth Circuit's contrary decision cannot be sustained on the basis that BIA's decision in *N-A-M-* warrants *Chevron* deference. First, because here "the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842. As this Court has already explained with respect to BIA interpretations, "[w]e only defer . . . to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *St. Cyr*, 533 U.S. at 320 n.45 (internal citations omitted). This principle extends to all of the normal canons – including the longstanding rule of immigration lenity, which this Court has invoked in two cases in which the BIA's interpretations were at issue. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004); *Clark v. Martinez*, 543 U.S. 371, 380 (2005).

"Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. It authorized the Attorney General to determine that some crimes are particularly serious even if they do not carry a sentence of at least five years, but it restricted the universe of crimes that can qualify as particularly serious to aggravated felonies.

In *N-A-M-*, the BIA not only failed to address immigration lenity, the *expressio unius* canon, or the *Charming Betsy* doctrine, *see N-A-M-*, 24 I. & N. Dec. at 337, but it in fact regarded its holding as compelled by "a plain reading of the Act," *id.* at 338. When, as here, an agency believes that it is performing the interpretative function of adjudication – namely, applying clear text – it is not exercising the policy reasoning and discretion that ordinarily entitles its construction of an ambiguous statute to deference. *Peter Pan Bus Lines, Inc. v. Fed. Motor*

Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006) ("[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." (citing a long line of cases)); *see also Sec'y of Labor, Mine Safety and Health Admin. v. Nat'l Cement Co. of Cal., Inc.*, 494 F.3d 1066, 1073-75 (D.C. Cir. 2007); *cf. Negusie v. Holder*, 129 S. Ct. 1159, 1166-67 (2009) (holding that the BIA, in considering itself bound by the "plain language" of a statute and a court decision, "has not yet exercised its *Chevron* discretion"). Indeed, in "deferring" to such an agency interpretation, the court would necessarily be *disagreeing* with the agency's holding that the statute was clear. An agency cannot have it both ways.

B. This Court Should Also Resolve The Closely Related Question Of Under What Circumstances, If Any, The Commission Of A Crime Which Is Not An Aggravated Felony Can Render A Non-Citizen Ineligible For Asylum.

Certiorari should be granted to determine the scope of the term "particularly serious crime" with respect to asylum as well as withholding of removal. The statutory provision governing withholding of removal that this Court granted certiorari to address in *Ali* directly parallels the provision governing asylum. Both are rooted in an identical requirement that a non-citizen is ineligible for relief if the individual, "having been convicted by a final judgment of a particularly serious crime," is "a danger to the community." *Compare* 8 U.S.C.

§ 1231(b)(3)(B)(ii) *with id.* § 1158(b)(2)(A)(ii). Construction of the withholding provision moreover inevitably implicates directly the proper construction of the parallel asylum statute. *See supra* at 18 (explaining that asylum provision permitting Attorney General to designate particularly serious crimes demonstrates that such authority does not exist with respect to withholding of removal).

The plain language of the statute governing asylum limits "particularly serious crimes" to two categories: (1) aggravated felonies; and (2) crimes that the Attorney General has designated as "particularly serious" by regulation. Petitioner's export conviction does not fall into either of these categories. Pursuant to the *expressio unius* canon (*see supra* at 17-18), the Attorney General lacks authorization to designate crimes as particularly serious through other means. Thus, petitioner is eligible for asylum. The Fourth Circuit's contrary interpretation renders Section 1158(b)(2)(B)(ii)'s "by regulation" clause surplusage.

The structure of the statute moreover demonstrates that Congress intended the Attorney General to determine that certain offenses preclude asylum, in contrast to the individualized case-by-case judgment the Fourth Circuit approved in this case. There is a stark contrast between the provision governing withholding of removal, which authorizes the Attorney General to determine through case-by-case adjudication whether an alien's conviction is particularly serious, 8 U.S.C. § 1231(b)(3)(B), and the asylum provision, which directs the Attorney General to "designate by regulation offenses" that will be considered particularly serious, *id.* § 1158(b)(2)(B)(ii).

Congress's decision to specify by regulation the offenses that will be considered particularly serious makes sense in light of the difference between asylum and withholding. The withholding remedy is mandatory if a non-citizen meets the criteria and none of the exceptions apply. However, as Judge Berzon explained in *Delgado*, "[e]ven for aliens eligible for asylum, the Attorney General can exercise discretion not to grant asylum because of the alien's criminal record." Thus, "[t]he only reason to specify 'particularly serious crimes' for asylum eligibility purposes, consequently, is to provide for uniformity with regard to *categories* of crimes." 563 F.3d at 879 (Berzon, J., concurring in part and dissenting in part) (emphasis added).

In concluding that, for purposes of asylum, "particularly serious crimes" were not limited to aggravated felonies and those crimes that the Attorney General had designated by regulation, the Fourth Circuit relied heavily on Congress's use of the permissive word "may," rather than a more commanding "must," in Section 1158(b)(2)(B)(iii); thus, the panel concluded, Congress had left the method of designation to the Attorney General's discretion.

That interpretation misses the mark. In Section 1158(b)(2)(B)(iii), Congress used permissive language because the Attorney General is not required to designate additional crimes at all: the statute already defines a category of crimes – aggravated felonies – that are per se particularly serious for purposes of asylum. If the Attorney General so chooses, he "may" designate additional crimes as particularly serious. But the statute is not permissive with regard to the

method by which the Attorney General may do so; rather, it specifically provides that any designations by the Attorney General will occur "by regulation." *See, e.g., United States v. Interlink Sys.*, 984 F.2d 79, 82 (2d Cir. 1993) (concluding that the language "may obtain review" through a particular court did limit appellate review to that court, and the permissive "may" indicated only that review was not mandatory).

II. Certiorari Is Warranted To Determine Whether Withholding of Removal And Asylum Are Categorically Unavailable Without An Individualized Determination That The Individual Is A Danger To The Community.

Federal law provides that a non-citizen shall be ineligible for withholding of removal or asylum if the Attorney General determines that she, having been convicted of a "particularly serious crime," is a "danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii); *id.* § 1158(b)(2)(A)(ii). Consistent with the uniform view of the other courts of appeals to have considered the question, the Fourth Circuit held that under these provisions the fact that an individual has been convicted of a particularly serious crime means *ipso facto* that she is a danger to the community. Pet. App. 12a n.1.

1. Certiorari is warranted because the Fourth Circuit's decision conflicts with the decisions of other signatories to the Convention – whose opinions, this Court has recently reiterated, "are entitled to considerable weight." *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010) (citing *El Al Israel Airlines v. Tsui*

Yuan Tseng, 470 U.S. 392, 404 (1999)). Courts in Canada, Australia, and the United Kingdom have interpreted the Convention to require both a past conviction and a determination of prospective danger before a non-citizen is rendered ineligible for withholding. *See Pushpanathan v. Minister of Citizenship and Immigration*, [1998] 1 S.C.R. 982 ¶12 (Canadian Supreme Court explaining that the government must "make the added determination that the person poses a danger to the safety of the public or to the security of the country . . . to justify *refoulement*"); *In re Baias & Minister for Immigration, Local Government, and Ethnic Affairs* (1996) 43 A.L.D. 284 (Australian Appeals Tribunal reversing deportation order because non-citizen did not pose a future danger in spite of his conviction); *R v. Sec'y of State for Home Dep't*, [2006] EWHC 3513 (Eng. Q.B. 2006) (determining eligibility for withholding based on whether the alien was "convicted of a particularly serious crime *and* is a danger to the community").

This view is also supported by an equally telling consensus among experts on the Convention. The United Nations High Commissioner for Refugees has explained that "the requirement of constituting a danger to the community does not operate as a presumption arising out of a past conviction, but instead requires a separate assessment that is both individualized and prospective." Br. of United Nations High Commissioner for Refugees in Support of Petr. 18, *Ali v. Achim* (2007). Grahl-Madsen, upon whom this Court has relied before in interpreting the Convention, *see Cardoza-Fonseca*, 480 U.S. at 440 n.24, explains that "danger," as used in the provision,

"must mean a 'present or future danger,'" and that "[i]t is . . . not the acts the refugee has committed[] that warrant his expulsion, but these acts may serve as an indication as to the behaviour one may expect from him in the future." Commentary on the Refugee Convention 1951, at 139, *available at* http://www.unhcr.org/3d4ab5fb9.html (visited July 21, 2010); *see also id.* at 139-40 ("Because Article 33 (2) is concerned with the present and future more than with the past, it seems that the authorities in many cases ought to give a refugee fair warning and a chance to amend his ways, before expulsion to a country of persecution is seriously considered. It must be emphasized that Article 33(2) clearly calls for deciding each individual case on its merits."). While a past conviction therefore may provide evidence of future danger, it cannot replace danger as the grounds for ineligibility.

2. The court of appeals' ruling is unsustainable in light of the plain text of the statute. Whenever possible, this Court should interpret statutes such that "no clause, sentence, or word shall be superfluous, void or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). If Congress wished to render all non-citizens convicted of particularly serious crimes ineligible for withholding, there was no reason to include additional language directed to whether the individual is a "danger to the community."

The plain language of the statute also makes clear that whether a non-citizen is ineligible for withholding or asylum depends in part on whether she constitutes a *prospective* danger to the

community. The requirement that a non-citizen, "having been convicted of a particularly serious crime," *"is"* (withholding) or *"constitutes"* (asylum) a "danger to the community" cannot be satisfied by an analysis – like the Fourth Circuit's – which looks only to the non-citizen's past conduct. "Congress's use of a verb tense is significant in construing statutes." *Carr v. United States*, 130 S. Ct. 2229, 2236 (2010) (citing *United States v. Wilson*, 503 U.S. 329, 333 (1992)). Absent context-specific evidence to the contrary, "words used in the present tense include the future as well as the present," The Dictionary Act, 1 U.S.C. § 1; they do not, however, encompass past conduct, *see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . . but it did not choose this readily available option."). By contrast, other provisions of the withholding statute do deny eligibility based solely on a non-citizen's prior acts. *See, e.g.*, 8 U.S.C. § 1231(b)(3)(B)(iii) (non-citizen ineligible for withholding if she has "committed a serious nonpolitical crime outside the United States before [she] arrived in the United States").

This case shows why it is unreasonable to automatically assume that the commission of a "particularly serious crime" renders an individual a danger to the community. Petitioner's export conviction was not an aggravated felony, and she was sentenced to only a short jail term. The immigration judge, after making extensive factual findings, specifically determined that "the public interest would best be served by giving [petitioner] a chance to make good on her promise to redeem herself and

live a worthy future life. I believe that the respondent can and will achieve this potential." Pet. App. 100a-01a. Yet his grant of relief was reversed by the BIA, which expressly indicated that the immigration judge should have focused only on petitioner's underlying conviction, rather than whether she was likely to violate the law again. *Id.* 43a. Such a purely retrospective analysis cannot be reconciled with a statutory scheme that is designed to exclude those who constitute a present danger.

The Protocol strongly reinforces the conclusion that non-citizens are ineligible for withholding (and asylum) only if they have both been convicted of a particularly serious crime *and* constitute a present danger to the community. The language in federal law is not merely similar to that used in the Protocol; it replicates it exactly. *Compare* 8 U.S.C. § 1231(b)(3)(B) *with* Pet. App. 152a (Article 33 of the Protocol). Given Congress's use of language identical to that of the Protocol, and given the widespread understanding of the two-part inquiry required by the Protocol, *see supra* at 27-29, this provision should similarly be interpreted to require a separate finding of prospective danger before a non-citizen may be deemed ineligible for asylum.

III. This Case Is An Excellent Vehicle For Resolving Both Questions.

This case is an ideal vehicle to decide both of the questions presented. Petitioner squarely raised and preserved both of the questions presented at each level of review.

Further, the questions presented are outcome determinative in this case. If this Court agrees with

petitioner that, for purposes of withholding, a non-aggravated felony cannot be a "particularly serious crime," she will be eligible for relief; similarly, a holding that, for purposes of asylum, a non-aggravated felony can be a "particularly serious crime" only if the Attorney General has designated it as such by regulation would also render petitioner eligible for asylum.

Petitioner would also likely prevail on her claims for withholding and asylum if this Court were to hold that both the asylum and withholding provisions require a separate determination that the non-citizen is a danger to the community. In his opinion, Immigration Judge Schmidt determined that petitioner "seeks to enter the United States exclusively to care for her family and to support herself and her family through honest work"; moreover, as U.S. District Judge Ellis emphasized, "[a]t no time has the government, by counsel, in either [petitioner's] case or [her husband's] urged, argued, or stated that Ms. Gao posed a threat to national security." Pet. App. 111a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 22, 2010

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 07-2070

ZHAN GAO, PETITIONER,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT.

Filed: April 23, 2010

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Wilkinson and Judge Michael.

For the Court

Patricia S. Connor, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 07-2070

ZHAN GAO, PETITIONER,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, RESPONDENT.

Argued: December 1, 2009.
Decided: February 23, 2010.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

ARGUED: Amy Louise Howe, HOWE & RUSSELL, PC, Bethesda, Maryland, for Petitioner.

Zoe Jaye Heller, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

ON BRIEF: Tony West, Assistant Attorney General, Douglas E. Ginsburg, Senior Litigation Counsel, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

Before TRAXLER, Chief Judge, and WILKINSON and MICHAEL, Circuit Judges.

Petition denied by published opinion. Judge Wilkinson wrote the opinion, in which Chief Judge Traxler and Judge Michael joined.

OPINION

WILKINSON, Circuit Judge:

Zhan Gao petitions for review of a final decision by the Board of Immigration Appeals ("BIA") denying her applications for withholding of removal and asylum. The BIA determined through adjudication that she was ineligible for these forms of relief because her conviction for unlawful export of military technology was a "particularly serious crime," even though it was not classified as an aggravated felony.

In her petition for review, Gao makes two principal arguments. For purposes of withholding of removal, she argues that only aggravated felonies can qualify as particularly serious crimes. For purposes of asylum, she contends that a nonaggravated felony can qualify as a particularly serious crime only if the Attorney General first designates it as such through regulation.

After careful consideration, we reject both arguments. We defer to the BIA's reasoned view that an offense need not be an aggravated felony to qualify as a particularly serious crime for purposes of withholding. Furthermore, we conclude that the BIA may determine that a non-aggravated felony is a particularly serious crime for purposes of asylum through the process of case-by-case adjudication. We likewise reject Gao's additional arguments and deny her petition.

I.

A.

Zhan Gao was born in the People's Republic of China. She entered the United States in 1989 on a student visa and became a lawful permanent resident in 1993. Sometime thereafter, she began exporting controlled technology without a license to what the BIA described as "quasi-governmental entities in China" that focused on military research. Between October 2000 and January 2001, for example, she exported eighty microprocessors designed for use in military aircraft and missiles at a total sales price of $539,296. She and her husband did not, however, report any of this income in their 2001 federal tax return.

On January 20, 2001, Gao travelled to China with her husband and oldest child on a family visit. Shortly before she was scheduled to return to the United States, she was detained by Chinese authorities and separated from her husband and child. The authorities held her in solitary confinement, interrogated her for long hours, and accused her of taking "internal" documents out of China. On July 24, 2001, she was convicted of spying on behalf of Taiwan and sentenced to ten years in prison. Due at least in part to criticism from the United States, China released Gao on "medical parole" on July 26, 2001, and she returned to the United States.

After returning, Gao gained attention by speaking and publishing articles about her treatment in China. But around the same time, she resumed her business of exporting technology to China. She did so without

obtaining or even inquiring about the proper licenses. Between November 2001 and January 2002, she made seven shipments, one of which was unlawful.

Unbeknownst to her at that time, the federal government had been investigating her exporting activities since the fall of 2000. The investigation culminated on February 25, 2002 when government agents executed a search warrant at her residence and discovered several items which are illegal to export without a license.

Following the search, Gao began cooperating with the government in an effort to obtain a lighter sentence. On November 26, 2003, she pled guilty to one count of unlawful export of Commerce Control List items in violation of 50 U.S.C. § 1702 and § 1705(b) and to one count of tax fraud in violation of 26 U.S.C. § 7206(1). Based on her cooperation, the district court granted her a downward departure and sentenced her to seven months of imprisonment, eight months of community confinement, and three years of supervised release. It also ordered her to pay an assessment of $200, a fine of $2,500, forfeiture of $505,521, and taxes, interest, and penalties of $88,885.

B.

Following Gao's release from prison, the Department of Homeland Security ("DHS") detained her and initiated removal proceedings. It charged that Gao was inadmissible and thus removable on two independent grounds: (1) her convictions for unlawful export and tax fraud were "crime[s] involving moral turpitude" under 8 U.S.C. § 1182(a)(2)(A)(i)(I) and (2) the Attorney General had reasonable grounds to

believe that she sought "to enter the United States to engage solely, principally, or incidentally in" an activity "to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information" under 8 U.S.C. § 1182(a)(3)(A)(i)(II).

The immigration judge ruled that Gao's convictions for tax fraud and unlawful export were crimes involving moral turpitude, rendering her removable under Section 1182(a)(2)(A)(i)(I). But he found that she was not removable under Section 1182(a)(3)(A)(i)(II) because a "reasonable person" would not expect her to engage in future unlawful activity.

Turning to the question of relief, the immigration judge found that Gao was entitled to asylum, withholding of removal, and deferral of removal under the Convention Against Torture (CAT). He rejected DHS's contention that she was ineligible for asylum and withholding because her conviction for unlawful export was a "particularly serious crime" under 8 U.S.C. § 1158(b)(2)(A)(ii) and § 1231(b)(3)(B)(ii). While acknowledging that Gao's crime created a risk of future harm, he concluded that it was not particularly serious because it did not involve "a direct link to violent crime" or "directly affect the health of individuals in the United States."

DHS appealed, arguing among other things that Gao was removable under Section 1182(a)(3)(A)(i)(II) and that her conviction was a particularly serious crime. The BIA found no error on the first point, but it reversed on the second. While acknowledging that

Gao's crime of unlawful export was not an aggravated felony, the BIA reasoned that its "national security implications" rendered it a particularly serious crime. It was "impossible," the BIA explained, "to quantify the number of lives [Gao] potentially imperiled by exporting military technology that is still presumably extant." Accordingly, it held that Gao was ineligible for asylum and withholding of removal. It did, however, uphold the immigration judge's conclusion that she was eligible for protection under the CAT.

Both parties filed motions to reconsider, and the BIA issued a second decision. This time, it reversed the immigration judge's ruling that Gao was not removable under Section 1182(a)(3)(A)(i)(II), finding he applied the wrong standard of proof. But the BIA reaffirmed its previous conclusion that Gao's offense was a particularly serious crime, even though it was not an aggravated felony.

Gao filed a pro se petition for review of the BIA's decision, and this court subsequently appointed counsel to represent her. In this appeal, we note that Gao's removability under Section 1182(a)(2)(A)(i)(I) for crimes involving moral turpitude and her eligibility for protection under the CAT are not before us. Instead, Gao challenges the BIA's decisions that she is ineligible for withholding of removal and asylum and that she is removable under Section 1182(a)(3)(A)(i)(II) as an alien who seeks to enter the United States to violate its export laws.

II.

We first turn to Gao's eligibility for withholding of removal and asylum. Because the statutes governing

these forms of relief differ somewhat, we address them separately.

A.

We begin by setting out the relevant statutory provisions governing withholding of removal. Under the Immigration and Nationality Act ("INA"), an alien facing deportation is ineligible for withholding of removal if "the Attorney General decides," among other things, that "the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii). For purposes of this provision:

> an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

§ 1231(b)(3)(B). The INA defines "aggravated felony" at 8 U.S.C. § 1101(a)(43). The parties agree that Gao's unlawful export offense falls outside that definition.

Gao urges us to read this paragraph to imply that *only* aggravated felonies can qualify as particularly serious crimes. She notes that the first sentence creates a per se rule that aggravated felonies accompanied by prison terms of at least five years are particularly serious. She then contends that the second sentence modifies the one before it by granting

the Attorney General discretion to find that other aggravated felonies are particularly serious on a case-by-case basis. But because the second sentence does not mention non-aggravated felonies, she argues that the Attorney General is implicitly precluded from considering those offenses as particularly serious crimes.

We have jurisdiction to review this question of law under 8 U.S.C. § 1252(a)(2)(D), but we do not approach it with a blank slate. The BIA has held that "a particularly serious crime need not be an aggravated felony" for purposes of withholding of removal. *In re N-A-M-*, 24 I. & N. Dec.-336, 337 (BIA 2007). In its view, the statute "creates no presumption that the Attorney General may not exercise discretion on a case-by-case basis to decide that . . . nonaggravated-felony crimes are also `particularly serious.'" *Id.* at 338 (quoting *Ali v. Achim,* 468 F.3d 462, 470 (7th Cir. 2006)). The second sentence, it explained, "means only that aggravated felonies for which sentences of less than 5 years' imprisonment were imposed may be found to be 'particularly serious crimes,' not that *only* aggravated felonies may be found to be such crimes." *Id.* at 341.

When it interprets ambiguous provisions of the INA, the BIA is entitled to deference under the familiar principles of principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). *INS v. Aguirre-Aguirre,* 526 U.S. 415, 424 (1999). Moreover, we note that "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that

implicate questions of foreign relations.'" *Id.* at 425 (quoting *INS v. Abudu,* 485 U.S. 94, 110 (1988)).

Applying the principles of *Chevron* here, we conclude that Congress has not "directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. The term "particularly serious crime" is open-ended, and the statute does not define it. And prior to the BIA's decision in *N-A-M-,* the courts of appeal were divided over whether only aggravated felonies could be particularly serious crimes for purposes of withholding of removal. *Compare Alaka v. Attorney Gen. of the United States,* 456 F.3d 88, 105 (3d Cir. 2006) (holding that particularly serious crimes must be aggravated felonies), *with Ali,* 468 F.3d at 470 (rejecting that view). Accordingly, we defer to the BIA's interpretation so long as it "is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843.

For the reasons below, we conclude that the BIA's interpretation was plainly permissible. In doing so, we join the other circuits that have had occasion to consider the BIA's *N-A-M-* decision. *See N-A-M v. Holder,* 587 F.3d 1052, 1055-56 (10th Cir. 2009); *Delgado v. Holder,* 563 F.3d 863, 867-69 (9th Cir. 2009); *Nethagani v. Mukasey,* 532 F.3d 150, 156-57 (2d Cir. 2008).

The reasons for this consensus are straightforward. The statute does not declare that some categories of crimes may not be considered particularly serious. Instead, it creates a per se rule that some aggravated felonies must be considered particularly serious and then leaves it up to the Attorney General to "decide[ ]" whether other crimes

are as well. 8 U.S.C. § 1231(b)(3)(B). Petitioner would read the second sentence of the quoted paragraph to impose a major limitation on the Attorney General's discretion by implication. But the language of that provision is not restrictive, but permissive. In our view, the BIA quite naturally reads that sentence not as implicitly limiting the Attorney General's discretion to aggravated felonies but instead as reinforcing the scope of that discretion. That is, the second sentence clarifies that the previous sentence simply creates a *per se* category of particularly serious crimes, rather than the *exclusive* category. As the Second Circuit explained, the BIA "naturally and reasonably reads the second sentence of § 1231(b)(3)(B) as a caution against drawing an available inference from the prior sentence." *Nethagani,* 532 F.3d at 157

The BIA has also noted two other factors that support its interpretation. First, the "history and background" of the particularly serious crime provision suggest that it is not limited to the universe of aggravated felonies. *N-A-M-,* 24 I. & N. Dec. at 339. Since Congress first enacted the provision in 1980, the BIA's "consistent practice" has "reflected an understanding" that particularly serious crimes need not be aggravated felonies. *Id.* at 338-39. And despite the fact that Congress has amended the statute several times, it has never limited the concept of particularly serious crimes to aggravated felonies. *Id.* at 339-41 (tracing the history of the provision).

Second, the BIA noted that its reading was consistent with the purpose of the statute, which is to protect the public from dangerous individuals. *Id.* at 341. As it observed, some crimes, such as possessing

biological weapons or tampering with consumer products, are potentially quite serious yet do not meet the technical requirements of being aggravated felonies. *Id.* at 341 & n. 6. Limiting particularly serious crimes to aggravated felonies would therefore "create[ ] a gap or loophole" whereby individuals committing very serious crimes would remain eligible for withholding of removal, unless some other statutory exception happened to apply to them. *Id.* at 341.

For these reasons, we shall respect the BIA's interpretation. Accordingly, we hold that the Attorney General and, by extension, the BIA had the authority to determine whether Gao's conviction was a particularly serious crime under Section 1231(b)(3)(B)(ii) even though it was not an aggravated felony.[1]

B.

We now turn to Gao's eligibility for asylum. Much like in the context of withholding of removal, an alien is ineligible for asylum "if the Attorney General determines that," among other things, "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A)(ii). The statute then provides two

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[1] Gao also faults the BIA for not making separate findings on the seriousness of her crime and her dangerousness to the community. But it is well settled in this circuit that "once the particularly serious crime determination is made, the alien is ineligible for withholding without a separate finding on dangerousness." *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (en banc).

"Special rules" for applying the particularly serious crime provision in the context of asylum. § 1158(b)(2)(B). First, "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime," regardless of the length of sentence imposed. § 1158(b)(2)(B)(i). Second, "[t]he Attorney General may designate by regulation offenses that will be considered" particularly serious crimes. § 1158(b)(2)(B)(ii).

Gao does not dispute that non-aggravated felonies can qualify as particularly serious crimes for purposes of asylum and for good reason. Given that the statute makes all aggravated felonies per se particularly serious, the Attorney General's power to designate offenses as such by regulation would be "wholly redundant" if it were limited to aggravated felonies. *Delgado v. Holder,* 563 F.3d 863, 870 (9th Cir. 2009).

Instead, Gao contends that regulation is the exclusive means by which the Attorney General can determine that a non-aggravated felony is a particularly serious crime. The BIA, she argues, is thus precluded from making these determinations through case-by-case adjudication. We have jurisdiction over this legal question under 8 U.S.C. § 1252(a)(2)(D), and we reject Gao's claim for the reasons below.[2]

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[2] The Attorney General argues that Gao failed to exhaust her administrative remedies as required by 8 U.S.C. § 1252(d)(1) with respect to her asylum claim, but on balance we agree with Gao that her filings before the BIA repeatedly challenged the BIA's statutory authority to determine that her conviction was a

First of all, nothing in the statute says that the Attorney General must use regulation to designate crimes as particularly serious. Instead, the statute empowers the Attorney General to "determine[ ]" whether an alien has been convicted of a particularly serious crime, 8 U.S.C. § 1158(b)(2)(A), and then provides that he "*may* designate by regulation offenses that will be considered" as such. § 1158(b)(2)(B)(ii) (emphasis added). Like our sister circuits, we think that Section 1158(b)(2)(B)(ii) simply empowers the Attorney General to designate offenses which, like aggravated felonies, will be considered per se particularly serious. *Delgado,* 563 F.3d at 870; *Ali v. Achim,* 468 F.3d 462, 468-69 (7th Cir. 2006). Its nature is again permissive, and it does not preclude him and, by extension, the BIA from determining whether an individual alien's crime was particularly serious by looking at the underlying facts in the course of adjudication.

Second, it is a basic principle of administrative law that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 203 (1947); *see also NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 294 (1974). This principle exists for good reason. Rulemaking, by its very nature, is categorical, whereas adjudication is sensitive to the facts of particular cases. While rulemaking has certain advantages, requiring an agency to proceed by rulemaking alone could "stultify

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"particularly serious crime" for purposes of asylum and withholding of removal.

the administrative process" by rendering it "inflexible and incapable of dealing with many of the specialized problems which arise." *Chenery II*, 332 U.S. at 202.

Here, for example, it is not difficult to discern why the BIA has chosen the flexibility that adjudication affords. The underlying circumstances of an alien's crime may make that crime particularly serious, "even though the same offense committed by other persons in other circumstances would not necessarily be particularly serious." *Delgado*, 563 F.3d at 870. Recognizing this, the BIA examines crimes on a case-by-case basis to identify dangerous individuals and protect the public from them. Absent statutory language to the contrary, we are reluctant to push the BIA to a categorical approach that would be insensitive to individual circumstances.

Third, the Attorney General would also face immense practical difficulties if he were required to act through rulemaking alone. It would be a Herculean task to "sift through each state's code and prospectively identify by regulation every single crime that would qualify as 'particularly serious.'" *Ali*, 468 F.3d at 469. Courts should not casually impose such burdens on administrative agencies, especially where, as here, there is no indication that Congress intended to do so.

For these reasons, we conclude that the BIA was permitted under Section 1158(b)(2) to determine that Gao's offense was particularly serious through adjudication.

C.

Next Gao argues that, even if we reject her legal challenges, we should nonetheless find that the BIA abused its discretion in determining that her crime was particularly serious. The INA provides that we may not review determinations of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . ., other than granting of [asylum]." 8 U.S.C. § 1252(a)(2)(B)(ii). While there is some question as to how explicit the statutory language conferring discretion on the Attorney General must be to invoke this provision, *compare, e.g., Nethagani v. Mukasey*, 532 F.3d 150, 155 (2d Cir. 2008), *with Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006), the resolution of that issue is not necessary in the case before us because the BIA plainly acted with the bounds of its discretion.

The BIA determines whether crimes are particularly serious on a case-by-case basis, considering factors such as "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community." *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (BIA 1982). Appellate courts should not lightly reverse for abuse of discretion in cases where, as here, lower tribunals weigh various factors under a totality-of-the circumstances test. The weighing of such factors is the very essence of a discretionary judgment.

Considering such factors, the BIA determined that Gao's conviction for unlawfully exporting military technology was particularly serious. The BIA acknowledged that Gao's sentence had been relatively light, but it discounted this factor because her sentence was "based largely on the fact that [she] had cooperated with law enforcement officials," rather than on the nature of her offense. It also acknowledged that unlawful export is not a particularly serious crime on its face, but it concluded that the "national security implications" of Gao's conduct elevated it to that status. By selling "sophisticated microprocessors with well-known military applications" to "quasi-governmental entities in China" that were known to do military research, Gao "placed her desire for financial gain ahead of the security interests of the United States." It was "impossible," the BIA explained, "to quantify the number of lives [Gao] potentially imperiled by exporting military technology that is still presumably extant."

In her petition, Gao criticizes the BIA's decision on a number of grounds, but her main contention appears to be that her crime cannot be considered particularly serious because there is no evidence that it actually harmed anyone. The BIA soundly rejected this argument, however, reasoning that it was "the very potential of risk that [made] [Gao's] offense so serious." There is no question that this did not represent an abuse of discretion.

III.

Lastly, Gao challenges the BIA's finding that she was inadmissible and thus removable under 8 U.S.C.

§ 1182(a)(3)(A)(i)(II), as one whom the Attorney General "knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in" any activity "to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information." We need not reach this issue either because it too is not relevant to the outcome of this case.

The immigration judge found and Gao concedes that she was removable for another, independent reason: her convictions for unlawful export and tax fraud were crimes "involving moral turpitude" under 8 U.S.C. § 1182(a)(2)(A)(i)(I). Thus, Gao is removable regardless of whether Section 1182(a)(3)(A)(i)(II) also applies to her.

Gao points out that if we deemed her eligible for asylum and withholding of removal, a finding of inadmissibility under Section 1182(a)(3)(A)(i)(II) would have certain collateral effects on her ability to seek additional relief in the future. But having affirmed the BIA's conclusion that she is not eligible for asylum and withholding, we see no reason to express an opinion on the applicability of Section 1182(a)(3)(A)(i)(II).

IV.

For the reasons above, Gao's petition is

DENIED.

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF BOARD OF IMMIGRATION APPEALS

IN RE: ZHAN GAO
IN REMOVAL PROCEEDINGS
MOTION

File: A70 519 150 – Arlington VA

Falls Church, Virginia 22041

Date: September 25, 2007.

ON BEHALF OF RESPONDENT: Ladan Mirbagheri Smith, Esquire

ON BEHALF OF DHS: Maryellen Meymarian, Associate Legal Advisor

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] – Crime involving moral turpitude
Sec. 212(a)(3)(A)(i)(n), I&N Act [8 U.S.C. § 1182(a)(3)(A)(i)(II)] – Seeks entry to violate or evade law relating to prohibited exports

APPLICATION: Reconsideration

This case was last before the Board on March 22, 2007, on appeal from the Department of Homeland Security (DHS). In that decision, we affirmed the Immigration Judge's determination that the respondent, a native and citizen of the People's Republic of China, was not inadmissible under section 212(a)(3)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(A)(i)(II), as an "alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any activity . . . to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information." However, we found that the respondent's conviction under 50 U.S.C. §§ 1702 and 1705(b) for unlawful export of Commerce Control List items constituted a particularly serious crime barring her from asylum under section 208 of the Act, 8 U.S.C. § 1158, and withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), both of which the Immigration Judge had previously granted. Finally, we affirmed the Immigration Judge's decision to grant the respondent's request for deferral of removal under the Convention Against Torture (CAT). *See* 8 C.F.R. § 1208.17 (2007).

On April 20, 2007, the DHS filed a motion to reconsider pursuant to 8 C.F.R. § 1003.2(b), asserting that the Board erred in concluding that the respondent was not inadmissible under section 212(a)(3)(A)(i)(II) of the Act.[1] The respondent submitted a brief opposing the DHS's motion. Additionally, on April 23, 2007, the

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[1] The motion does not challenge the Board's finding that the respondent is eligible for relief under the CAT.

respondent filed a cross motion to reconsider challenging our determination that her unlawful export conviction constitutes a particularly serious crime. The DHS's motion will be granted, and the respondent's motion will be denied.

A motion to reconsider must include an allegation of material factual or legal error in the prior decision that is supported by pertinent authority. *See Matter of OS-G-*, 24 I&N Dec. 56 (BIA 2006). The DHS suggests that we erred as a matter of law in affirming the Immigration Judge's conclusion that although the respondent's conviction raised a presumption that she was seeking to enter the country at least incidentally to engage in the illegal export of technology to China, the respondent successfully rebutted the presumption. The DHS asserts that the Immigration Judge erred in applying a "reasonable person" standard to the respondent's burden rather than requiring her to prove "clearly and beyond doubt" that she is entitled to be admitted to the United States and is not inadmissible under section 212 of the Act (I.J.-4[2] at 11-14). *See* section 240(c)(2) of the Act, 8 U.S.C. § 1229a(c)(2). We agree with the DHS that the respondent should have been held to this higher evidentiary standard. *See* 8 C.F.R. § 1240.8(b). We further agree that the respondent has not demonstrated clearly and beyond doubt that she is not

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[2] In our last decision, we referred to the Immigration Judge's final decision, rendered March 9, 2006, as "I.J." The Immigration Judge's order dated August 11, 2005, was designated "I.J.-2," the order issued September 23, 2005, was "I.J.-3," and the order dated February 3, 2006, was "I.J.-4."

inadmissible under section 212(a)(3)(A)(i)(II) of the Act.

The Immigration Judge correctly noted that the government bears the initial burden of proving by "clear, convincing, and unequivocal evidence" that a returning lawful permanent resident should be treated as an "arriving alien" under section 101 (a)(13)(C) of the Act, 8 U.S .C. § 1101 (a)(13)(C) I.J.-4 at 2). *See Matter of Huang*, 19 I&N Dec. 749 (BIA 1988); *Matter of Kane*, 15 I&N Dec. 258 (BIA 1975). The DHS met its burden in this case with evidence of the respondent's convictions for unlawful export and tax fraud, which constitute crimes involving moral turpitude rendering her inadmissible under section 212(a)(2) of the Act (I.J.-2 at 5). *See* section 101(a)(13)(C)(v) of the Act, 8 U.S.C. § 1101(a)(13)(C)(v). The Immigration Judge then properly shifted the burden to the respondent to show that she is not inadmissible under section 212(a)(3)(A)(i)(II) of the Act. *Cf. Beslic v. INS*, 265 F.3d 568 (7th Cir. 2001). In doing so, however, the Immigration Judge incorrectly held the respondent to the "reasonable person" standard articulated in section 212(a)(3)(A)(i)(II) of the Act, *see Matter of A-H-*, 23 l&N Dec. 774, 788-89 (A.G. 2005) (interpreting the statutory phrase "reasonable ground to believe" as requiring "information that would permit a reasonable person to believe"), rather than requiring her to prove that she is "clearly and beyond doubt" entitled to be admitted to the United States, as required under section 240(c)(2) of the Act, 8 U.S.C. § 1229a(c)(2) (I.J.-

4 at 2, 14).[3] We now consider whether the respondent has met the higher burden in this case.

As the Immigration Judge observed in his decision, the respondent resumed her illegal export activities after being paroled into the United States following her highly publicized detention in China in 2001 (I.J.-4 at 9). The respondent admitted that she made a conscious decision not to inquire about licensing for certain export items because she did not expect to be successful (I.J.-4 at 10; Exh. 4, Tab 12). She made seven shipments between November 2001 and January 2002 before her business was raided in February 2002 (Exh. 4, Tab 24). The Immigration Judge noted that because the respondent had received substantial loans from certain entities in China, she had a "continuing need for quick cash" and used the profits from her illegal export business to fulfill her financial obligations (I.J.-4 at 9).

In support of its argument that the respondent seeks to enter the United States to engage at least incidentally in unlawful export activities, the DHS points to evidence that, even after her arrest, the respondent adopted new aliases in order to continue obtaining goods. Had the respondent not been caught

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[3] This distinction would appear to make little difference in the outcome of the case, given that the only relief granted to the respondent, deferral of removal under the CAT, does not require an alien to prove that she is admissible. Indeed, the respondent argues that the issue is moot. However, section 236A(a)(3)(A) of the Act, 8 U.S.C. § 1226A(a)(3)(A), imposes mandatory detention on an alien whom the Attorney General has reasonable grounds to believe is inadmissible under, *inter alia*, section 212(a)(3)(A)(i) of the Act. *See Matter of U-H-*, 23 I&N Dec. 355, 356-57 (BIA 2002).

in 2002, the DHS asserts, she would have continued exporting technology to China in blatant violation of U.S. law. Significantly, Christine Marrion, a special agent with the Defense Criminal Investigative Service, testified that she objected to recommending a downward departure for the respondent based on her cooperation with the government's investigation because the respondent had contacted manufacturers and placed orders using a "fictitious name and cover story" in April or May 2003, only months before her November 2003 plea agreement (IJ.-4 at 10; Tr. at 390-92, 397-98).

While we understand that the respondent received a relatively light sentence and that the judge in her criminal case has emphasized that he never considered her to be a risk to national security, the test for inadmissibility under section 212(a)(3)(A)(i)(II) of the Act is merely whether there is "reasonable ground to believe" that she seeks to enter the United States "solely, principally, or incidentally" to engage in illegal exports. Despite evidence of lawful endeavors in which the respondent has engaged since entering the United States, there is also ample evidence of the respondent's unlawful activities relating to illegal exports. On reconsideration we conclude that she has not met her burden of demonstrating that she is clearly and beyond doubt entitled to be admitted. Accordingly, we reverse our previous decision and find that the respondent is inadmissible under section 212(a)(3)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(3)(A)(i)(II).

We now turn to the respondent's motion to reconsider, which challenges our finding that her

conviction for unlawful export of Commerce Control List items is a particularly serious crime that precludes her from asylum and withholding of removal. *See* sections 208(b)(2)(A)(ii) and 241(b)(3)(B)(ii) of the Act, 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1431(b)(3)(B)(ii). Specifically, the respondent argues that section 241(b)(3)(B) of the Act requires a finding that the respondent's offense constitutes an aggravated felony. Moreover, she suggests that even if her conviction need not be an aggravated felony in order to be considered a particularly serious crime, the Board misapplied its own precedent in *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982), in concluding that unlawful export qualifies as a particularly serious crime.

First, we disagree with the respondent that the plain meaning of the statute requires an offense to be an aggravated felony in order to qualify as a particularly serious crime. Section 241 (b)(3)(B) of the Act provides:

> For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term imprisonment of at least five years' shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, regardless of the length of sentence imposed, an alien has been convicted of a particularly serious crime.

The respondent suggests that the phrase "regardless of the length of sentence imposed" in the second sentence

of the above passage refers back to the description of an "aggravated felony" in the preceding sentence and expresses the "clear and unequivocal congressional intent" to extend the Attorney General's discretion in the particularly serious crime determination only to those aggravated felonies for which the alien has been sentenced to an aggregate term of less than 5 years and not to other crimes that, while serious, do not fall within the aggravated felony definition. Our last decision considered and rejected this interpretation of section 241(b)(3)(B), which the United States Court of Appeals for the Third Circuit adopted in *Alaka v. Attorney General of the United States*, 456 F.3d 88, 104-05 (3d Cir. 2006). We first noted that *Alaka* is at odds with other circuit courts in its interpretation of the statute. *See, e.g., Ali v. Achim*, 468 F.3d 462, 469-70 (7th Cir. 2006) ("The designation of aggravated felonies producing sentences of at least five years' imprisonment as per se 'particularly serious' creates no presumption that the Attorney General may not exercise discretion on a case-by-case basis to decide that other nonaggravated-felony crimes are also 'particularly serious.'"). Further, we emphasized that such a narrow reading of the language of section 241(b)(3)(B) would render a nullity the Board's long-standing practice under *Matter of Frentescu*, *supra*, of making particularly serious crime determinations on a case-by-case basis by analyzing the following factors: (1) the nature of the conviction, (2) the circumstances and underlying facts of the conviction, (3) the type of sentence imposed, and (4) whether the type and circumstances of the crime indicate that the alien

would be a danger to the community.[4] *See, e.g.*, *Matter of P-F-*, 20 I&N Dec. 661 (BIA 1993); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986); *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986); *see also Matter of Y-L-, A-G-*, and *R-S-R-*, 23 I&N Dec. 270 (A.G. 2002). Thus, we find no error in our previous conclusion that while the respondent's unlawful export conviction is not an aggravated felony, it may still be considered a particularly serious crime.

Likewise, the respondent has failed to identify any error of law or fact in our analysis of the *Frentescu* factors. As we stated in our previous decision, unlawful export under 50 U.S.C. § 1702 is not a particularly serious crime on its face. We also acknowledged that the respondent received a comparatively light sentence for her offense. Nevertheless, in light of the particular facts and circumstances of this case, we find it necessary to conclude that the respondent's unlawful export activity with China presented a risk to national security that elevated her offense to a particularly serious crime. *See Yousefi v. USJNS*, 260 F.3d 318, 329-30 (4th Cir. 2001) (emphasizing that the circumstances and underlying facts of a conviction and

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[4] While not raised by the respondent and therefore waived, we note that we disagree with the Ninth Circuit's decision in *Morales v. Gonzales*, 478 F.3d 972, 981-82 (2007), which purports to limit the information that may be used in determining whether a crime is particularly serious. The court relied on a snippet quoted from *Matter of L-S-*, 22 I&N Dec. 645, 651 (BIA 1999), that does not accurately reflect the Board's practice concerning particularly serious crime determinations, nor even its specific application in that case, where the Board looked to the individual circumstances of the crime. *See id.* at 654.

whether the alien would be a danger to the community in light of those facts are the most important considerations in the particularly serious crime analysis). The respondent suggests that the Military Intel486 DX2 microprocessors that she exported to China have myriad uses, and she had no knowledge that they would be used for military purposes (Respondent's Motion at 9). We find this argument unavailing. First, we note that the microprocessors were purchased by the 14th, 20th, and 29th Research Institutes, which are quasi-governmental entities that are known to perform military research (Tr. at 285; Exh. 8, Tab 60; Exh. 13, Tabs 60, 285). Further, the respondent's lack of knowledge regarding the microprocessors' end use is unimportant, given the fact that they have recognized military uses, and their export is restricted by the United States government for national security reasons (Tr. at 206, 265-66; Exh. 2). Because of the inherent risk involved in exporting restricted technology from the United States, we see no reason to disturb our prior conclusion that the respondent's unlawful export conviction qualifies as a particularly serious crime. Accordingly, we will enter the following orders.

ORDER: The DHS's motion to reconsider is granted.

FURTHER ORDER: The respondent's motion to reconsider is denied.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to

complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31,2005).

APPENDIX D

IN RE: ZHAN GAO
IN REMOVAL PROCEEDINGS
APPEAL

File: A70 519 150 – Arlington VA

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF BOARD OF IMMIGRATION APPEALS
Falls Church, Virginia 22041

Date: March 22, 2007.

ON BEHALF OF RESPONDENT: Ladan Mirbagheri Smith, Esquire

ON BEHALF OF DHS: Maryellen Meymarian, Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] – Crime involving moral turpitude
Sec. 212(a)(3)(A)(i)(n), I&N Act [8 U.S.C. § 1182(a)(3)(A)(i)(II)] – Seeks entry to violate or evade law relating to prohibited exports

APPLICATION: Cancellation of removal; section 212(h) waiver; asylum; withholding of removal; Convention Against Torture

On March 9, 2006, an Immigration Judge granted the respondent's application for asylum, withholding of removal, and protection pursuant to the Convention Against Torture (CAT).[1] The Department of Homeland Security (DHS, formerly the Immigration and Naturalization Service) now appeals, challenging the decision on numerous grounds. First, the DHS argues that the Immigration Judge erred in finding that it failed to prove by clear and convincing evidence that the respondent, a native and citizen of the People's Republic of China, is inadmissible under section 212(a)(3)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(A)(i)(II), as an alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any activity to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information. Second, the DHS asserts that the respondent is statutorily barred from asylum and withholding of removal because her conviction under 50 U.S.C. §§ 1702 and 1705(b) for unlawful export of Commerce Control List items constitutes a particularly serious crime. The DHS further argues

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[1] The Immigration Judge denied the respondent's request for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), on discretionary grounds. The respondent has not appealed that decision.

that the respondent is ineligible for such relief because her conviction for tax fraud under 26 U.S.C. § 7206(1) is an aggravated felony as defined by section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i), to wit, an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $ 10,000." Alternatively, the DHS suggests that even if the respondent were not barred from relief by her convictions, she failed to meet the respective burdens of proof for asylum, withholding of removal, and protection under the Convention Against Torture, and does not merit asylum as a matter of discretion. The appeal will be sustained in part and dismissed in part.

I. BACKGROUND

The respondent entered the United States as a student in 1989 and has been a lawful permanent resident since 1993, when she adjusted her status pursuant to the Chinese Student Protection Act (I.J.[2] at 7; Tr. at 828-29, 871). In February 2001, she traveled to China with her United States citizen husband and 5-year-old son. Shortly before their return flight to the United States, the respondent was detained at the airport, separated from her family, and interrogated by Chinese agents (Tr. at 834-35). She was accused, of taking "internal" government documents out of the country and was detained

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[2] We will refer to the Immigration Judge's final decision, rendered March 9, 2006, as "I.J." The Immigration Judge also issued three interlocutory decisions in this case. The order dated August 11, 2005, will be designated "I.J.-2," the order issued September 23, 2005, will be "IJ.-3," and the order dated February 3, 2006, will be "I.J.-4."

without access to her family or a lawyer.[3] The respondent was kept in solitary confinement from February 11 to April 1, 2001, and was interrogated 10 to 14 hours a day regarding her activities since her departure from China, her trips to Taiwan, and her association with the Chinese Scholars of Political Science (I.J. at 8; Tr. at 837). She was then moved to a detention center outside Beijing, where she was held in a small shared cell, forced to sleep on a wooden board, and interrogated 4 to 6 hours a day (I.J. at 8; Tr. at 836-37). On July 24, 2001, the respondent stood trial for espionage on behalf of Taiwan; she was convicted and sentenced to 10 years in prison. Nevertheless, due to the extensive publicity her case received in this country and diplomatic pressure from the United States government, the respondent was released on "medical parole"[4] on July 26, 2001, after a 166-day incarceration, and was allowed to return to the United States (I.J. at 9; Tr. at 848-49; Exh. 4, Tab 11).

Throughout her detention, however, the respondent was under investigation in the United States for exporting controlled goods to China without

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[3] The respondent later learned that her husband and son had been allowed to return to the United States after being held 26 days in China (Tr. at 873-74; 1023-25).

[4] According to Wikipedia, an online encyclopedia, the term "medical parole" describes the practice of releasing a "dissident . . . on the grounds that they need to be treated for a medical condition in another country, and with the understanding that they will be reincarcerated if they return to China." Approximately 25,000 prisoners are released annually on medical parole grounds in the People's Republic of China. *See* http://en.wikipedia.org/wiki/Medical_parole.

a license (Exh. 2). The record reflects that the respondent unlawfully exported 80 Military Intel486 DX2 microprocessors, which have both military and non-military applications, between October 2000 and January 2001 at a total price of $539,296 (Exh. 2). The respondent's husband filed the couple's federal tax return on April 7, 2001, while the respondent was detained; the return did not report any business income (Exh. 2). On November 26, 2003, the respondent pled guilty in the United States District Court for the Eastern District of Virginia to one count of unlawful export of Commerce Control List items in violation of 50 U.S.C. §§ 1702, 1705(b); 15 C.F.R. §§ 736.2, 764.3(b), 774.1; and Executive Orders 12924 and 13222 (Exh. 2). She also pled guilty to a single count of tax fraud in violation of 26 U.S.C. § 7206(1) (Exh. 2). The respondent was sentenced on March 5, 2004, to 7 months in prison, 8 months of community confinement, and 3 years of supervised release. She was also ordered to pay an assessment fee of $200, a fine of $2,500, a forfeiture of $505,251, and taxes, interest, and penalties in the amount of $88,885 (Exh. 2). The respondent's husband was convicted of a tax misdemeanor and sentenced to 1 year in prison. The respondent has been in DHS custody since the completion of her prison sentence in April 2005 (Exh. 27).[5]

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[5] The community confinement portion of the respondent's sentence was vacated on June 27, 2005, after the court determined that the DHS had "frustrated the purpose of [the respondent's] split sentence by taking her into custody following her release from prison and, for reasons not apparent from the record, refusing to release her on bond to serve the community

In an interlocutory order dated August 11, 2005, the Immigration Judge determined that the respondent, who was paroled into the United States upon her return in July 2001, is an arriving alien for purposes of these proceedings (I.J.-2 at 2-3). In the same order and a subsequent one issued on September 23, 2005, the Immigration Judge found that the respondent's convictions for unlawful export and tax fraud constituted crimes involving moral turpitude, and that she was therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien convicted of a crime involving moral turpitude (I.J.-2 at 3-4; I.J.-3 at 6-7). These findings have not been challenged on appeal. The Immigration Judge further determined that the respondent's conviction for tax fraud was not an aggravated felony under section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i), and that her conviction for unlawful export was not a particularly serious crime that would bar her from asylum and withholding of removal (I.J.-3 at 7-10). In a decision dated February 3, 2006, the Immigration Judge found that the DHS had failed to establish that the respondent is inadmissible under section 212(a)(3)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(3)(A)(i)(II), as an alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any activity to violate or evade any law prohibiting the

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confinement portion of her sentence." *Gao v. United States*, 375 F. Supp. 2d 456, 467 (E.D. Va. 2005).

export from the United States of goods, technology, or sensitive information (I.J.-4).

II. DISCUSSION

A. Inadmissibility under section 212(a)(3)(A)(i)(II) of the Act

First, we will affirm Immigration Judge's conclusion that the respondent is not inadmissible under section 212(a)(3)(A)(i)(II) of the Act as an alien who seeks to enter the United States to engage solely, principally, or incidentally in any activity to violate or evade any law prohibiting (he export from the United States of goods, technology, or sensitive information. The Immigration Judge properly determined that the respondent's conviction for unlawful export created the presumption that she was seeking to enter the country at least incidentally to engage in the illegal export of technology to China (I.J.-3 at 3). *See Beslic v. INS*, 265 F.3d 568 (7th Cir. 2001). The burden then shifted to the respondent to rebut the presumption.

We find no error in the Immigration Judge's conclusion that the respondent successfully rebutted the presumption of inadmissibility. First, he noted that the respondent has engaged in a "wide range of lawful activity" since entering this country in 1989 and becoming a lawful permanent resident in 1993. Significantly, she is married to a United States citizen and has three young sons (Tr. at 871-72).[6] The respondent and her family own a home in northern Virginia (Tr. at 877). She earned a doctorate in

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[6] The respondent applied to become a naturalized United States citizen in 1999, but her application was eventually denied on March 9, 2005 (Exh. 2, Tab 8).

sociology from Syracuse University in 1997 (Exh. 26, Tabs O, P). Before her arrest, the respondent was a faculty fellow with the School of International Studies at American University in Washington, D.C. She also has worked for the National Organization for Women, the American Association of University Women, and Chinese Scholars of Political Science, and has been a freelance commentator for Radio Free Asia and Voice of America (Tr. at 860, 876, 879; Exh. 26).

The Immigration Judge further observed that although the respondent continued her business dealings from July 2001 to January 2002, following her return from China, there was no evidence that she had engaged in any unlawful shipment of controlled items since 2002 (I.J.-4 at 9-12; Tr. at 328-31; 479; Exh. 14, Tab 24). Moreover, Judge T.S. Ellis III, who presided over the respondent's criminal proceedings, issued an order for use by the Immigration Court indicating that the United States Attorney for the Eastern District of Virginia had moved for a significant downward departure from the federal sentencing guidelines based on the respondent's "substantial assistance to law enforcement authorities on matters of national security" (I.J.-4 at 10-11; Exh. 21, Tab 83).[7] Judge Ellis followed the recommendation, sentencing the respondent to 7 months in prison and allowing her to remain free on conditions for 3 months (which was later extended to 6 months) while nursing

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[7] The United States Attorney's office also sent a letter to the DHS recommending, in light of the respondent's "substantial assistance in the investigation of others who had committed crimes," that she not be removed from the United States (Exh. 5, Tab 6; Exh. 27, Tab G).

her newborn son prior to serving her sentence (Exh. 21, Tab 83).[8] The Immigration Judge inferred from Judge Ellis's sentencing decision that he did not expect the respondent to engage in further unlawful export activity. Indeed, the Immigration Judge noted that, considering the "catastrophic consequences" the respondent's conviction had for her family and her academic career, she would be "highly motivated" to avoid any illegal activities in the future (I.J.-4 at 12-13). Additionally, the Department of Commerce revoked the respondent's export privileges for a 10-year period on March 18, 2005 (Tr. at 168-69; Exh. 14, Tab 26). Thus, we decline to disturb the Immigration Judge's reasonable conclusion, based largely on information provided by Judge Ellis and the United States Attorney, that the likelihood of the respondent's engaging in recidivist conduct is extremely low and that she is therefore not inadmissible under section 212(a)(3)(A)(i)(II) of the Act (IJ.-4 at 14).

B. Whether the respondent's conviction for unlawful export is a particularly serious crime

We now turn to the question of whether the respondent's conviction under 50 U.S.C. § 1702 for unlawful export of Commerce Control List items should be considered a particularly serious crime that would preclude her from asylum and withholding of removal. Section 208(b)(2)(A)(ii) of the Act provides that an alien shall be barred from asylum if the Attorney General determines that "the alien, having

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[8] The respondent could have been subject to a fine of not more than $50,000, or a prison sentence of not more than 20 years, or both, for her conviction under 50 U.S.C. § 1702. *See* 50 U.S.C. § 1705(b).

been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." *See* section 208(b)(2)(A)(ii) of the Act, 8 U.S.C. § 1158(b)(2)(A)(ii). Likewise, an alien convicted of a particularly serious crime is ineligible for withholding of removal. *See* section 241(b)(3)(B)(ii) of the Act, 8 U.S.C. § 1431(b)(3)(B)(ii).

The DHS suggests that the respondent's conviction constitutes a particularly serious crime because her business dealings with the Chinese institutes posed a risk to national security that, in light of the possible military uses of the microprocessors she was exporting, amounted to "economic espionage" (DHS Br. at 74). The DHS points out that the respondent's plea agreement stipulated that the microprocessors in question could be used on military aircraft in "navigation, digital flight control and weapons fire control systems, radar data processing, and airborne battle management systems," as well as in missiles to identify, locate, and destroy targets (Exh. 2). Exporters of these items are therefore required to obtain the proper licensing in order to safeguard such technology from getting into the wrong hands (Tr. at 206, 265-66).

While the Immigration Judge conceded that the respondent violated export control regulations enacted in the interest of national security and that her crime was more serious than typical "regulatory" offenses, he ultimately concluded that her conviction did not rise to the same level as drug trafficking, which is considered a *per se* particularly serious crime because of the inherent dangers involved in the illicit drug trade (I.J.-3 at 9-10). *See Matter of Y-L-, A-G-, and R-S-R*, 23 I&N Dec. 270 (A.G. 2002); *Matter of U-M-*, 20 I&N Dec. 327

(BIA 1991). We agree that an unlawful export conviction is not presumptively a particularly serious crime; in this case, however, we find that the national security implications of the respondent's offense render it a particularly serious crime.

The determination of whether a conviction constitutes a particularly serious crime must be made on a case-by-case basis. *See Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982) (finding that an alien's conviction for burglary of an unoccupied dwelling with the intent to commit theft, for which he served a sentence of 3 months with 1-year probation, was not a particularly serious crime), *modified on other grounds*, *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988). Factors to consider in weighing the seriousness of an alien's crime include (1) the nature of the conviction, (2) the circumstances and underlying facts of the conviction, (3) the type of sentence imposed, and (4) whether the type and circumstances of the crime indicate that the alien would be a danger to the community. *Id.*; *see also Yousefi v. USINS*, 260 F.3d 318, 329-30 (4th Cir. 2001) (emphasizing that the factors most important to the case-by-case analysis are the circumstances and underlying facts of the conviction and whether the alien would be a danger to the community in light of those facts). We note that the United States Court of Appeals for the Third Circuit recently held that an offense must be an aggravated felony in order to qualify as a particularly serious crime. *See Alaka v. Attorney General of the United States*, 456 F.3d 88, 104-05 (3d Cir. 2006) (interpreting section 241 (b)(3)(B) of the Act, which provides that an aggravated felony for which an alien

has been sentenced to an aggregate term of at least 5 years imprisonment shall be considered a particularly serious crime; the statute goes on to state that "[t]he previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime"). As far as we know, the Third Circuit stands alone in this interpretation. *See, e.g., Ali v. Achim*, 468 F.3d 462, 469-70 (7th Cir. 2006) (finding that an offense does not have to be an aggravated felony in order to be considered a particularly serious crime, and that the Attorney General has discretion to make the determination on a case-by-case basis). We further emphasize that *Alaka* contradicts the Board's long-standing practice of using the *Frentescu* factors to make particularly serious crime determinations. *See, e.g., Matter of P-F-*, 20 I&N Dec. 661 (BIA 1993); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986); *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986). Thus, although the respondent's unlawful export conviction is not an aggravated felony, that fact alone does not preclude it from being considered a particularly serious crime.

The respondent was convicted of willfully exporting Commerce Control List items without a license – specifically, sophisticated microprocessors with well-known military applications (Exh. 2). She used several aliases and obtained the devices at deep discounts by falsely claiming to be affiliated with various universities and telling distributors thatthe items would be used for academic purposes (T.J.-3 at 5-7; Tr. at 893-95; Exh. 4, Tab 12 at 53). The

respondent then sold the microprocessors at substantial mark-ups to quasi-governmental entities in China known as the 14th, 20th, and 29th Research Institutes (Tr. at 285; Exh. 13, Tabs 60, 285). The Immigration Judge observed in his February 3, 2006, decision that the respondent deliberately opted not to inquire about the licensing requirements for the products she was exporting, even after receiving notice from a supplier that she needed to do so (I.J.-3 at 6-7; Exh. 4, Tab 12 at 49-50; Exh. 13, Tab 231). After returning from her 5-month incarceration in China, the respondent resumed her business dealings and even adopted new aliases (I.J.-3 at 9; Exh. 13).

The respondent asserts on appeal that she "did no more than create the potential of a future risk" to national security (Respondent's Br. at 52). We consider this to be a specious argument, as it is the very potential of risk that makes the respondent's offense so serious. The respondent acted with blatant disregard for the laws of this country and placed her desire for financial gain ahead of the security interests of the United States (I.J.-3 at 7). It is impossible to quantify the number of lives the respondent potentially imperiled by exporting military technology that is still presumably extant (I.J.-3 at 9). We acknowledge that the convicting judge sentenced the respondent to only 7 months in prison; however, we also note that the downward departure from the sentencing guidelines was based largely on the fact that the respondent had cooperated with law enforcement officials and provided substantial assistance to an ongoing investigation (I.J-3 at 8-9; Exh. 21, Tab 83). *See Matter of Y-L-, A-G-, and R-S-R,*

supra, at 278 (observing that although an alien's "post-charge cooperation understandably secured a more lenient sentence, it did not retroactively alter the nature of [his] underlying offenses"). Moreover, the order Judge Ellis issued for use by the Immigration Judge focuses to some extent on the danger the respondent may pose to the community in the future, whereas the Board has emphasized that the seriousness of the conviction itself is the sole determinative factor for whether an alien represents a "danger to the community," under sections 208(b)(2)(A)(ii) and 241 (b)(3)(B)(ii) of the Act (Exh. 21, Tab 83). *See Matter of Carballe*, *supra*, at 360; *accord Kofa v. USINS*, 60 F.3d 1084, 1087-91 (4th Cir. 1995). Thus, the fact that the respondent's business has been shut down and her export license revoked has no bearing on the question of whether she is a danger to the community for purposes of the Act. Accordingly, we conclude that the circumstances and underlying facts of the respondent's unlawful export conviction support the finding that she has been convicted of a particularly serious crime and is therefore ineligible for asylum and withholding of removal.

In light of the foregoing conclusion, we decline to address the issue of whether the respondent's conviction for tax fraud in violation of 26 U.S.C. § 7206(1) is an aggravated felony under section 101(a)(43)(M)(i) of the Act.[9]

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[9] *See Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004).

C. Protection pursuant to the Convention Against Torture

Because the respondent is statutorily barred from asylum and withholding of removal, the only form of relief for which she remains eligible is deferral of removal under the Convention Against Torture. *See* 8 C.F.R. § 1208.17. Factors to be considered include evidence of past torture inflicted on the applicant; evidence that the applicant could relocate to another part of the country of removal; evidence of gross, flagrant, or mass violations of human rights in the country of removal; and other relevant information regarding country conditions. *See* 8 C.F.R. § 1208.16(c)(3). In this case, the respondent experienced unpleasant treatment and "highly coercive" interrogation while imprisoned in China, but she has not claimed – and the evidence does not suggest – that she was subjected to mistreatment rising to the level of torture, as defined by regulation (I.J. at 24). *See* 8 C.F.R. § 1208.18(a). There is ample support, however, for the Immigration Judge's conclusion that if the respondent were returned to China, it is more likely than not that she would be arrested, imprisoned, and subjected to considerably harsher treatment than she experienced during her 2001 detention (I.J. at 27). *See Matter of J-F-F*, 23 I&N Dec. 912 (A.G. 2006) (requiring an alien to establish that each link in a hypothetical chain of events leading to torture is more likely than not to occur).

Initially, we note that the respondent was released on medical parole only after considerable intervention on her behalf by the United States government; her conviction for espionage has not been expunged, and it

is more likely than not that she would be required to complete her 10-year prison sentence if she were returned to China (Tr. at 858, 1030, 1059-68). Second, the evidence of record suggests that the use of torture is widespread in the Chinese prison system (I.J. at 26; Exhs. 32, 33). As the Immigration Judge noted, the respondent is now more vulnerable to mistreatment rising to the level of torture because she violated the terms of her parole agreement by speaking out in a very public way – with articles in the New York Times Magazine and other mainstream American publications, as well as commentary on Radio Free Asia and Voice of America – against the treatment she received during her detention (I.J. at 25; Tr. at 849-51,859-66, 1031-32; Exh. 27). The respondent was openly critical of the way Chinese officials treated her and of the policies that led to her arrest and conviction (Exh. 27). Moreover, the respondent cooperated with federal authorities investigating other American and Chinese nationals involved in exporting goods illegally to China, which has likely had some negative impact on the Chinese government's ability to import American technology (I.J. at 25-26; Tr. at 1033; Exhs. 26, 27). Finally, because of her convictions, the respondent no longer has the protection of the international diplomatic community that previously came to her aid (Tr. at 867-68, 1034, 1038-40; Exh. 27, Tab C). *See* 8 C.F.R. § 1208.18(c). The DHS argues that the Immigration Judge's CAT determination is speculative because a letter issued by the Department of State dated March 7, 2006, indicates that department officials "cannot say with certainty whether [the respondent] might be tortured" (Exh. 32). As the Immigration Judge observed, however, the

respondent is not required to prove "with certainty" that she will be tortured if returned to China; she is required only to establish that torture is more likely than not to occur – that is, at least a 51-percent probability (I.J. at 27). Based on the record before us, we conclude that the respondent has met her burden and is eligible for deferral of removal under the CAT. Accordingly, we will enter the following orders.

ORDER: The DHS's appeal is dismissed in part and sustained in part.

FURTHER ORDER: The Immigration Judge's order granting the respondent's application for asylum and withholding of removal is vacated.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003. l(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). See Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

United States Immigration Court
901 North Stuart Street, Suite 1300
Arlington, Virginia 22203

IN THE MATTER OF:	)	IN REMOVAL PROCEEDINGS
GAO, ZHAN,	)	
	)	File No.: A#70-519-150
RESPONDENT	)	
	)	
	)	
	)	

CHARGES: Section 212(a)(3)(A) of the Immigration and Nationality Act ("INA" or "Act"), as amended, as an alien who, the Attorney General knows, or has reasonable ground to believe seeks to enter the United States to engage solely, principally or incidentally in: (i) any activity (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information.

Section 212(a)(2)(A)(i)(I) of the Act, as amended, as an alien who, has been convicted of, or who admits having

committed or who admits committing the act which constitute the essential elements of a crime involving moral turpitude.

APPLICATIONS: Asylum, pursuant to INA § 208(a);

Withholding of Removal, pursuant to INA § 241(b)(3);

Withholding of Removal, under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), pursuant to 8 C.F.R. § 1208.16 (2006); Cancellation of Removal for Lawful Permanent Resident, pursuant to INA § 240A; and

Waiver of Inadmissability, pursuant to INA § 212(h).

APPEARANCES

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FOURTH ORDER: RELIEF AND FINAL ORDER

I. INTRODUCTION

The respondent, a married female native and citizen of the People's Republic of China ("PRC"), is a returning lawful permanent resident alien. In this order, I grant her applications for asylum, withholding of removal to the PRC, and relief under Article 3 of the CAT. I deny both of her waiver applications for discretionary reasons, thus terminating her lawful permanent resident status.

A. Prior Rulings Incorporated by Reference

In my First Preliminary Order of August 11, 2005, my Second Preliminary Order of September 23, 2005, and my Third Order: Removability Under 212(a)(3)(A)(i)(II), I found, among other things, that: (1) the respondent is properly charged as an arriving alien; (2) she is inadmissible and therefore removable on each of the two crime involving moral turpitude charges; (3) she is not inadmissible under section 212(a)(3)(A)(i)(II) of the Act; (4) she has not committed "particularly serious crimes" that would bar her from asylum or withholding of removal; (5) her tax fraud conviction is not an aggravated felony; (6) she is ineligible for voluntary departure because of lack of good moral character; and (7) she is eligible to apply for relief in the form of asylum under section 208, withholding of removal under section 241(b)(3), withholding and deferral of removal under Article 3 of the CAT, cancellation of removal under section 240A(a), and waiver of inadmissibility under section 212(h). I incorporate my prior decisions by reference.

B. Preservation of Parties' Appeal Rights

The parties disagree with various aspects of my prior rulings and by incorporating those rulings into this final decision I preserve the parties' rights to appeal any and all aspects of my prior orders. The DHS specifically disputes my rulings numbered (3), (4), (5), and, to the extent that I have found the respondent eligible to apply for relief beyond deferral of removal under the CAT, (7). The respondent specifically disputes my ruling that her export control violation is a crime involving moral turpitude. The respondent recently amended her original pleading and now admits the allegation that she is an arriving alien, as I previously have found.

C. Respondent's Custody Status

The respondent has been detained by the DHS, pending these proceedings, since on or about April 5, 2005, when her 7-month criminal incarceration ended.

D. Closed Hearing

The respondent specifically asserted her right to a confidential asylum hearing as guaranteed by 8 C.F.R. § 208.6. Accordingly, I directed that the hearing be closed to the public and that the parties not publicly discuss the case or distribute any of my orders.

E. Relief Phase

On February 13 and 14, 2006, I held hearings on the respondent's applications for relief. I heard the testimony of the respondent and her two witnesses, and heard closing arguments.

Thereafter, on February 15, 2006, the Assistant Chief Counsel alerted me that the respondent's asylum application had not been forwarded to the U.S. Department of State ("DOS") for input as required by 8 C.F.R. § 208.11. To remedy this, on the same day I had the respondent's Form 1-589 and Group Exhibits 25, 27, and 28 hand carried to the State Department's Bureau of Democracy, Human Rights, and Labor. I held the record open for 30 days for the receipt of the State Department's input, and I informed the parties that they would be given 30 days from receipt of those views to make additional submissions or request a further evidentiary hearing.

The State Department's submission was received on March 7, 2006. Given the limited scope of the State Department's submission, I found that a shorter response period would be adequate. Therefore, I granted the parties until close of business on March 17, 2006 to provide comments or additional evidence in response to the letter from the State Department.

The DHS response to the State Department submission was received on March 17, 2006. The respondent's submission, including tabs A-I, also was received on March 17, 2006.

The respondent used her response to the State Department letter as an opportunity to submit additional evidence, that I did not invite or authorize, subsequent to her hearing. I have considered tab A of the submission, Professor Cohen's supplemental letter, which specifically pertains to the State Department's response. I have not considered the respondent's additional submissions in making my decision. I note

that except for the recent newspaper articles, which are cumulative in nature, the respondent's submissions are neither newly discovered nor previously unavailable. I will, however, include the respondent's entire submission in the record for purposes of appellate review.

In this decision, I will decide all remaining questions concerning the respondent's various applications for the relief described at number (7) above.

II. ISSUES

The issues are:

(1) Credibility;

(2) Whether the respondent has suffered past persecution in the PRC on account of political opinion, which is relevant to her claims for both asylum and withholding under section 241 (b)(3) — this issue involves the sub-issues of: (a) whether the respondent's PRC espionage conviction was prosecution or persecution; and (b) whether the harm to the respondent stemming from her detention and conviction in the PRC rises to the level of persecution;

(3) Whether the respondent satisfies the "extraordinary circumstances" exception to the one year filing deadline for asylum as described in 8 C.F.R. § 208.4(a)(5)(iv);

(4) Whether, on the basis of the regulatory presumption or independently, the respondent has shown that it is more likely than not that she will be persecuted in the future in the PRC on account of

political opinion for purposes of withholding under section 241(b)(3);

(5) Whether, on the basis of the regulatory presumption or independently, the respondent has shown that she has an objectively reasonable fear of future persecution in the PRC on account of political opinion for purposes of asylum;

(6) Whether the respondent has shown that it is probable that she will suffer "torture" if returned to the PRC for purposes of relief under Article 3 of the CAT;

(7) Whether the respondent should receive a favorable exercise of discretion on her asylum application; and

(8) Whether the respondent should receive a favorable exercise of discretion on her waiver applications.

III. LEGAL STANDARDS

A. Asylum

The Immigration and Nationality Act, as amended by the Real ID Act of 2005, governs this case. The respondent has the burden of proof on her applications. In this respect, the respondent's credibility is very important and may be determinative. Generally, the respondent must testify in detail, plausibly, and consistently. The respondent should satisfactorily explain any material discrepancies or omissions.

I may grant an application solely on the basis of credible testimony, without further corroboration. But,

I will do this only if I am satisfied that the respondent's testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate that the respondent is a refugee.

In determining whether the respondent has met her burden of proof, I may weigh credible testimony along with other evidence of record. Where I determine that the respondent should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the respondent does not have that evidence and cannot reasonably obtain that evidence.

In making credibility determinations, I will consider the totality of the circumstances and all relevant factors. I may base a credibility determination on the respondent's or witness's demeanor, candor, or responsiveness, and the inherent plausibility of the account. I may also consider the consistency between written and oral statements (whenever made, whether or not under oath, and considering the circumstances under which such statements were made), the internal consistency of each such statement with other evidence of record (including DOS country reports), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the respondent's claim. I may also consider any other factor or factors relevant to credibility.

In accordance with circuit law, even in cases where the respondent does not testify credibly, I will evaluate the record as a whole to determine whether

independent evidence establishes the respondent's claims. *Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004).

To be eligible for asylum, the respondent must show that she is unwilling or unable to return to the PRC because of persecution or an objectively reasonable fear of persecution and that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the respondent.

Under the regulations, if the respondent establishes past persecution, I must presume the respondent's future persecution unless the government proves that fundamentally changed circumstances or a reasonably available internal relocation alternative have eliminated that individualized fear. Even then, I may grant asylum if the respondent demonstrates compelling reasons arising out of the past persecution or if she shows a reasonable possibility of other serious harm in the country of removal.

In exercising discretion, I will generally grant asylum to eligible aliens, particularly those with immediate family abroad, in the absence of egregious adverse discretionary factors. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

B. Withholding of Removal Under Section 241(b)(3)

To qualify for withholding of removal, the respondent must show that it is more likely than not that she will be persecuted in the PRC and that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one

central reason for persecuting the respondent. This is a higher standard than for asylum. Like asylum, however, if the respondent shows past persecution, she benefits from a rebuttable presumption of future persecution.

C. Article 3 of the CAT

To be eligible for relief under Article 3 of the CAT, the respondent must show that it is more likely than not that she will be subject to torture in the PRC, by, at the instigation of, or with the acquiescence of a public official or one acting in an official capacity. Unlike asylum, which requires a showing of nexus, the respondent need not establish that the torture is on account of any particular ground.

"Torture" is an extreme form of cruel, inhuman, or degrading treatment or punishment, and does not include all such treatment. In particular, atrocious or grossly substandard prison conditions usually are not considered torture. *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).

In this Circuit, "acquiescence" as used in 8 C.F.R. § 208.18 does nct require "knowing acquiescence" in, or "willful acceptance" of, torture. See *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004). Rather, "[acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (emphasis added).

To qualify for relief under the CAT, the respondent must prove that the torture inflicted would be carried

out with the awareness of government officials. That awareness includes both "actual knowledge" and "willful blindness." See *Lopez-Soto*, *supra*. Merely showing that, in the abstract, government officials know of a torturer's activities and are generally unable to stop them, does not show that government officials are "willfully blind" to the torture of their citizens by third parties. Id.

In *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002), the Attorney General rejected for lack of government acquiescence CAT claims by respondents from Haiti and the Dominican Republic who feared retaliation from drug interests because of the respondents' cooperation with US authorities. The Attorney General characterized the risk of violence as an "occupational hazard" of the illegal drug trade. The Attorney General found that the respondents had failed to show that any torture would be inflicted upon them with the consent or approval of authoritative government officials acting in an official capacity. The Attorney General found that personal vengeance inflicted by lower level government agents would not fall within the CAT definition.

In *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002), the BIA found that a combination of the factors presented made it probable that an ethnic Armenian Christian would be arrested for drug offenses, imprisoned, and tortured in Iran. In *Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002), the BIA found that a Nigerian woman claiming that she would be imprisoned and tortured upon return because of her drug offense was basing her claim on a chain of assumptions and fear of what

might happen rather than on proof that government sponsored torture was probable.

D. Cancellation of Removal

The respondent has the burden of proof on her cancellation of removal application. I must balance the adverse factors evidencing the respondent's undesirability as a permanent resident with any social and humane considerations in the respondent's favor to determine whether the granting of the waiver is in the best interests of the country.

Favorable factors may include: family ties within the United States; long residence in the United States (particularly where such residence began at a young age); evidence of hardship to the respondent and his/her family if removal occurs; service in the U.S. Armed Forces; a history of employment; the existence of property or business ties; evidence of worthwhile community service; proof of genuine rehabilitation; and other evidence attesting to the respondent's good character.

Unfavorable factors may include the nature and the underlying circumstances of the ground leading to removal; presence of additional significant violations of our immigration laws; the existence of a criminal record, including nature, recency, and seriousness; and other evidence indicative of a respondent's bad character or undesirability as a lawful permanent resident.

In exercising discretion, I will consider the totality of the facts and circumstances involved. However, one or more adverse factors may ultimately be

determinative of whether the waiver is granted in this case.

E. Waiver Under Section 212(h)

In this particular case, my ruling on the respondent's section 212(h) waiver application is controlled by my reasoning on the issue of discretion in connection with her cancellation of removal application. Therefore, I find it unnecessary to set out the separate standard for section 212(h) relief.

IV. SUMMARY OF CLAIM AND EVIDENCE

A. Testimony

1. Respondent's Testimony

The respondent first entered the U.S. in July 1989 on an F-1 student visa, later becoming an LPR in September 1993 as a result of the Chinese Student Protection Act.[1] The respondent has been married since 1987 and has 3 U.S. citizen sons, ages 10, 3, and 2. She received a Ph.D. in sociology in 1997 from Syracuse University, where she began her side export business while working as a research and teaching assistant. The respondent's husband has a master's degree in electrical engineering from Syracuse University.

The respondent testified that she did not have any particularly serious problems with the Chinese Government before she came to the U.S. Though she

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[1] In my Third Order I made the factual finding that the respondent "apparently" became an LPR through her marriage to her husband. I now amend that factual finding to reflect that the respondent became an LPR through the Chinese Student Protection Act.

participated in the student movement in 1989, she was not interrogated or imprisoned at that time and was able to receive her exit permit to leave China.

The respondent returned to China approximately 12 to 15 times to visit her parents, attend academic conferences, and to conduct business. She made two trips to Taiwan en route to China in 1995 and in 1999 to attend conferences.

The respondent did not experience any difficulties during her visits to China, until 2001, when she, her husband, and son were detained by 20 to 30 Chinese secret police agents at the airport when trying to return to the U.S. The secret police separated the respondent, her husband, and her son, taking the respondent to a house outside of Beijing. The respondent did not know what had happened to her husband and son, causing her great anguish.

The secret police interrogated the respondent from 9 a.m. until 2 a.m. the next morning, shining a bright light at her, and denying her food or access to the toilet. The respondent was questioned about her activities from the time she left China to the time she returned, including her trips to Taiwan and her role as treasurer for the Chinese Scholars of Political Science. The respondent was held in solitary confinement at the house from February 11 until April 1, 2001, and was routinely interrogated for 10 to 14 hours a day. The respondent was prohibited from communicating with the outside world.

The respondent was then taken to a detention center run by the Beijing state security police outside of Beijing, where the conditions were much harsher.

The respondent was detained in a small cell with no bed and no hot water and she was forced to sleep on a wooden board. One tactic the Chinese Government employed, according to the respondent's affidavit, was "board sitting," in which the respondent was forced to sit very straight on a board and reflect on her crimes. The interrogations continued, lasting 4 to 6 hours a day. The secret police showed the respondent articles that she had taken out of China and passed on to her colleagues about the Taiwan-China relationship, economic reforms in China, and speeches by Chinese leaders about the Taiwan-China relationship.

The respondent testified that in Taiwan, she had met with her counterparts at universities and discussed the relationship of Taiwan and China and the future of a democratic China. The respondent used some of the articles she had taken from China for her own research and passed some on to her colleagues in the U.S. The respondent did not believe the articles were classified because they were primarily photocopies of newspaper articles, academic journals, and books which were marked as "internal." The respondent testified that she did not know that it was illegal to take "internal" documents out of China because they could be found in libraries and bookstores (though the Chinese Government did make announcements not to take the documents out of China). The respondent stated that she failed to follow the Chinese law because it is against the international standard.

The secret police agents who guarded the respondent permitted her to send a fax to her husband on April 12, after she went on a brief hunger strike. In

the fax, the respondent gave her husband instructions with how to handle several business transactions and the upcoming tax deadline. The respondent was subsequently allowed to send a second fax.

The respondent was denied access to her attorneys until July, when she was permitted to meet with her attorneys for about two hours in the presence of guards. The respondent's attorneys informed the respondent that her husband and son were safe and that she was going to be indicted as a spy for Taiwan. Her son was held in Chinese custody for 26 days before being released and reunited with his father. Respondent's husband was also released after 26 days. He was interrogated intensively the first few days of his detention and pressured to say things which would implicate the respondent.

The respondent was able to see her attorneys again the day before her trial for less than 2 hours. To the respondent's knowledge, the Government did not give her attorneys any documents that they planned to use as evidence against her, although they did permit them to briefly review evidence.

The respondent's trial was less than 3 hours long. There were 11 people in the courtroom, including 3 judges, 2 prosecutors, the respondent, her 2 lawyers, and several guards. There was no jury and no witnesses for either party. The respondent's family was barred from entering the courthouse. The Government did not present any of the articles that the respondent took out of China. The prosecutor used the statements of the respondent's colleagues and her

husband, who had confirmed her trip to Taiwan, as evidence against her.

In her defense, the respondent told the judges that none of the articles that she took outside of China were marked as classified and that the speeches by Chinese leaders were broadcast on television and published in papers. The respondent presented 2 statements from her colleagues saying that they had read the respondent's articles and that they were academic pieces based on facts. The respondent also presented a statement from her parents. After the evidence was presented, the judge announced a 40 minute recess and then found the respondent guilty, sentencing her to 10 years imprisonment.

The next day, the respondent's lawyers told her that she was to be released the following day on medical grounds. The respondent was released on July 26, 2001, after 166 days of imprisonment. A few hours before her scheduled release, the respondent's interrogators made her sign a paper as a condition of her release stating that she would not speak to anybody about what had happened.

Upon returning to the United States, the respondent "answered a call of conscience" and spoke out and wrote publicly about her detention in China and the Chinese Government's practice of mistreating political dissidents and its abuse of human rights. Respondent received a phone call in September or October 2001 from a Chinese official who warned her not to say anything about her experience.

The respondent testified that before and after her release, her family members in China were questioned

by Chinese secret police, and they are required to report to the secret police every 3 months. The respondent further testified that she believes all her family's phone lines are tapped.

During and after her imprisonment, the respondent's sister, mother, and parents-in-law came to the U.S. The respondent's sister and mother subsequently returned to China. While in the U.S., the respondent's mother applied for asylum, which was not approved. She returned to China during the pendency of the appeal because her husband was in the hospital. The respondent's parents-in-law currently reside at her house in Fairfax, Virginia and have pending LPR applications.

The respondent testified that she is applying for asylum now, more than a year after her last arrival into the United States, because she has held a green card since 1993 and did not expect to be detained on immigration charges. The respondent is applying for asylum because she fears for her life because of the 10-year prison sentence she received in China, her widely publicized criticism of the Chinese Government after her return, and her cooperation with U.S. authorities.

The respondent fears that upon return to China, she will be forced to serve her full 10 year sentence and will be detained with common criminals who the Government will have beat and torture her. The respondent also believes that she will be denied medical treatment for her ailments, as well as communication with family members and access to the media. The respondent believes that she would no longer have the support of the U.S. Government, even

as the wife of a U.S. citizen and the mother of 3 U.S. citizen sons. Although it is not the practice of the Chinese Government to torture high-profile dissidents, the respondent believes that she has lost the protection of the U.S. Government.

The respondent has written numerous articles detailing her ordeal and criticizing the Chinese Government's abuses. The respondent worked as a commentator for Voice of America and Radio Free Asia and as an editorialist and editor for the internet publication *Observe China*, a Chinese language magazine, in which she has published over 100 articles (although she did not submit any of them in this proceeding). The respondent's articles were also published in *The New York Times*, *The Washington Times*, and *The Wall Street Journal*.

During the U.S. Government's investigation of her illegal export activities, the respondent provided information to the U.S. Attorney's Office about Chinese and American nationals who engaged in unlawful export activity to China.

The respondent currently owns a house in Fairfax, Virginia, valued at approximately $1 million with a $400,000 mortgage. The respondent and her husband have joint assets of approximately $60,000 and her husband has individual assets of about $40,000, a retirement account, and $250,000 life insurance policy. The respondent's children are currently receiving Medicaid based on her and her husband's unemployment. The unemployment results from their convictions, the respondent's detention, and her husband's pending incarceration.

The respondent testified that she does not owe any taxes to the IRS and has corrected her previously incorrect filings. Upon release from her current detention, the respondent would like to return to teaching, publish a book, open a Chinese language institute, or open a restaurant. She believes her husband, currently unemployed and awaiting the execution of his Federal criminal sentence, could be a computer consultant.

The respondent began attending a Christian church, the Syracuse Alliance Church, shortly after coming to the U.S., and became a Christian 9 years after coming the U.S. When she moved to Virginia, the respondent attended several churches, including a Catholic church in McClean, a Lutheran church in Fairfax, and then the non-denominational Harvest Chinese Church of Fairfax. The respondent has continued her religious activities while in prison in the U.S., and credits the DHS for enhancing her belief in Christ. Since she has been in jail, she has read the Bible, attended Bible studies, listened to Bible radio programs and discussed Bible passages with other inmates. The respondent also believes that she and her family would suffer religious hardship or persecution because of China's low tolerance of religious freedom. The respondent stated that she would never denounce her religious belief.

The respondent testified that her 3 sons barely speak Chinese. Her oldest son, Andrew, who was with her when she was detained in China, suffers from separation anxiety and is afraid of the dark and of being by himself. He has nightmares of seeing his mother taken from him and sometimes wakes up

crying. Aaron is 3 years old and also suffers from separation anxiety. He has an eating disorder and expects his mother to call him every day. The respondent's 2-year old son, Anderson, was only 1 when his mother left, and was taught to call the respondent mother when she called by telephone.

The respondent testified that her children would suffer further trauma by being separated from her. The children would also suffer if they returned to China with the respondent because they would be discriminated against by the Chinese. The respondent believes that her husband would have trouble finding employment and she testified that schools in China charge 10 times more for foreigners.

The respondent testified that she had an incident with a guard at the Hampton Roads regional jail on April 15, 2005 while in DHS custody when an officer took her book. The respondents denies that the incident was over towels, as stated in the incident report, or that she assaulted the guard and told her that she did not speak English. The respondent states that it was a misunderstanding and that she is now on excellent terms with that guard. She did not contest the disciplinary action and received a 21-day disciplinary sentence.

2. Professor Jerome Cohen, Respondent's Expert

Professor Cohen is employed as a teacher at NYU Law School and specializes in Chinese law, human rights, and criminal justice. He has often advised detainees in China.

faxes. Although it is not normal to be allowed to send faxes, Professor Cohen knows of several cases where the Chinese Government has allowed contact with family members in order to get individuals to confess, or if the individual is threatening suicide or has some other type of mental distress, especially in the case of women.

According to Professor Cohen, the respondent was not subject to physical torture and it is not normal for state security personnel to use physical torture at the pre-trial stage. Instead, psychological methods are used.

Professor Cohen testified that the respondent was released on medical parole because of an agreement between the U.S. and Chinese Governments made in Bangkok by Secretary of State Colin Powell and the Chinese foreign ministry which enabled China to save face and to vindicate its right to prosecute. Professor Cohen testified that medical parole can be cancelled and the respondent could be forced to serve the remainder of her sentence.

If she is forced to return to the PRC, Professor Cohen believes that the respondent's situation would be much worse than before, given her human rights activities and her highly critical articles in high-profile publications. Professor Cohen believes that the respondent "did a lot of things to stick her finger in the eyes of the Chinese Government." He also notes her widely publicized cooperation with the U.S. Government to help locate people in the Chinese Government who seek to import controlled items.

Professor Cohen affirmed his belief that there is a high probability, absent the most formal assurances by the Chinese Government, that the respondent will be subject to imprisonment and torture because she would be in prison with other inmates and she is not in the same posture as before. Detainment with other inmates introduces a high likelihood of abuse with the wink and knowledge of their custodians. He believes that there is an 80% chance that the respondent would be tortured upon return to the PRC.

Professor Cohen testified it is not normal for state security to resort to torture, but once convicted, an individual is put into the ministry of justice system which is not run as well as state security. Professor Cohen believes that if the respondent is returned to China her conviction will be reinstated and her subsequent activities could form the basis for further criminal prosecution.

Professor Cohen stated that the respondent's name does not appear in the DOS country report for 2001 because she was locked up in February 2001, right after the 2000 report was issued. By the time the 2001 report was released, she was released and being investigated by the U.S. Government for her illegal export activities.

Given the respondent's illegal export activities, the enthusiasm of the U.S. Government and the 400 plus academics who had previously supported the respondent has diminished.

3. Pastor Mark Shaltanis

Pastor Shaltanis is the pastor of the St. Paul's Lutheran Church in Falls Church, Virginia, where the

respondent was a member from late 2000 to early 2002.

When the respondent came back from China, she continued to attend the church. However, she encountered some hard feelings among some of the members of the congregation, causing her and her husband to stop attending St. Paul's and begin attending the Harvest Church.

Pastor Shaltanis knows about the respondent's convictions in the United States and was surprised and disappointed when he heard about her unlawful activities.

Pastor Shaltanis has discussed the respondent's case with her new pastor, who did not testify on the respondent's behalf, but who assured him that the respondent and her husband had been very involved in church. Pastor Shaltanis has also spoken with the chaplain at the prison where the respondent is currently being held, who reported that the respondent had requested Bibles and had been involved in Bible study. He also spoke to Carrie Woods, a former inmate, with whom the respondent spoke about studying the Bible and praying.

Pastor Shaltanis visited the respondent in the hospital when her youngest child was sick and at her home after her second child was born. He has also visited the home since the respondent has been detained and has observed the relationship of the respondent's husband with their children. Pastor, Shaltais stated that the respondent's husband has struggled with being a single parent. However, the Pastor has not had a lot of interaction with the

children, nor has he talked to Andrew about his experience (though he noted that there were times that Andrew would go off by himself or act out).

Pastor Shaltanis testified that the respondent told him that she regrets what she has done and is remorseful. The respondent wrote him a letter stating that she was ashamed and embarrassed. Pastor Shaltanis believes that her confession is sincere.

Pastor Shaltanis does not believe that the respondent will return to unlawful export activities and he believes that the suffering she has endured has given her character and enabled her to appreciate her family. He believes that the respondent is intelligent and bright, and that she has learned her limitations.

B. Evidence

1. Respondent's Documentation

In support of her applications, the respondent submitted: her skeleton asylum application (GRX 25); her applications for cancellation of removal and 212(h) waiver and supporting documentation (GRX 27, T-A to T-P), including her affidavit (T-A), her husband's statement (T-B), a copy of her marriage certificate with English translation (T-C), a copy of her husband's naturalization certificate (T-D), copies of the birth certificates of her 3 U.S. citizen children (T-E), a statement from her parents-in-law (T-F), a copy of the receipt for her parents-in-law's LPR applications (T-G), newspaper articles detailing her arrest and detention (T-H), a copy of her joint tax returns from 2001-2003 (T-J), a letter to Senator Orrin Hatch, dated April 13,2001, from Gerri L. Ratliff, Acting Director, Congressional Relations (T-K), a copy of her most

recent passport (T-L), a contract between her and Radio Free Asia (T-M), INOVA Health System authorization forms (T-N), a copy of a Doctor of Philosophy degree from Syracuse University (T-O), a copy of a Master of Arts degree from Syracuse University (T-P); her asylum application, affidavit (T-A), and supporting documentation (GRX 27, T-A to T-G), including articles authored by the respondent from *The New York Times Magazine* and *The Washington Times* entitled "My Ordeal in a Chinese Cell," and "Changing Strategy of a Smart Chameleon" (T-B, F), a letter from Professor Cohen stating that there is a likelihood the respondent would be tortured if returned to China (T-C), various articles and editorials from newspapers and news agencies about the respondent's detention and trial for espionage charges in China, her release, and her criminal trial and cooperation with authorities in the U.S. (T-D-G); additional documents in support of application for cancellation for removal and 212(h) waiver (GRX 29, T-86), including tax records for 1998-2001; Order from Judge Ellis and transcript (GRX 21, T-83-85); her documentary submissions accompanying pre-hearing brief (GRX 5, T-l-16); her documentary submissions accompanying her reply brief (GRX 6, T-17-21); her submission verifying that she is not seeking to enter the U.S. to violate export control laws (GRX 14, T-22-38); documentary submission accompanying her motion requesting the dismissal of DHS evidence (GRX 15, T-38a-38c); documentary submission accompanying her notification to the Court of a sentencing hearing on January 13, 2006 relating to her husband (GRX 20, T-81-82); Notification of Denial of Export Privileges (GRX 17, T-39); Additional

Submission Verifying that Respondent is Not Seeking to Enter the United States to Violate Export Control Laws and Therefore is Not a Risk to the National Security (GRX 19, T39-81); and a copy of the ICE website page (X 24).

2. DHS Documentation

In opposition to the respondent's applications, the DHS submitted: the respondent's record of conviction, and her application for, and denial of, naturalization (GRX 2, T-l-8); copy of the respondent's 1-94 and Memo of Creation of Record of Lawful Permanent Resident (GRX 3, T-9-10); DHS submission in support of removability (GRX 4, T-11-19); documentary submission accompanying memo in support of removability charge (GRX 8, T-20-71); DHS Hearing Outline (GRX 13, T-l-285); DHS evidentiary submission of December 23, 2005 (GRX 16, T-255,286-293), including the Order Denying Export Privileges to Zhan Gao (T-286); DHS trial summary (GRX 22); export control regulations (GRX 23); DHS evidentiary submission of January 13, 2006 (GRX 28, T-300-316), including the 2004 and 2001 Country Reports for China (T-300-301), the Respondent's articles "Freedom from Fear" and "My Ordeal in a Chinese Cell" and article drafts (T-304-307), various news articles about the respondent (T-308-312, 315-316); the incident report from Hampton Roads Regional Jail (GRX 30, T-317); and a letter from the respondent's father-in-law (GRX 31, T-318).

3. State Department Response

The State Department submitted its response to my request for comments (X 32) on March 7, 2006,

which is meant to be read in conjunction with the 2005 Country Report (X 33).

The State Department finds that the respondent's brief trial in China on charges of spying was "notably lacking in due process."

Unaware of the reason behind the respondent's imprisonment (other than what the respondent and the Chinese authorities have said and the formal charge), the State Department states that it has no way of knowing if the respondent would be imprisoned again if she were returned to China.

Further, the State Department is not certain whether the respondent would be tortured if she was again imprisoned. However, the State Department finds that "torture does take place in Chinese prisons," and notes that the UN Special Rapporteur on Torture concluded after a recent visit that torture was "widespread" in China.

4. 2005 Country Report

According to the 2005 Country Report (X 33), the Government's human rights record remained poor, and the Government continued to commit numerous and serious abuses. There was a trend towards increased harassment, detention, and imprisonment by Government and security authorities of those perceived as threatening to Government authority. The Government also adopted measures to control more tightly print, broadcast and electronic media, and censored online content. Protests by those seeking to redress grievances increased significantly and were suppressed, at times violently, by security forces. There were notable developments in legal reforms

during the year. However, some key measures to increase the authority of the judiciary and reduce the arbitrary power of police and security forces stalled. The Government adopted new religious affairs regulations expanding legal protection for some activities of registered religious groups but was criticized for failing to protect unregistered groups.

During the year politically motivated and other arbitrary and unlawful killings occurred. While no official statistics on deaths in custody were available, state-run media reported that law enforcement officials killed 460 persons and seriously injured more than 100 through abuse or dereliction of duty in 2003.

Trials involving capital offenses sometimes took place under circumstances involving severe lack of due process and with no meaningful appeal. Executions often took place on the day of conviction or failed appeal. The Government regarded the number of death sentences it carried out as a state secret. However, in March 2004 a National People's Congress ("NPC") deputy asserted that nearly 10 thousand cases per year "result in immediate execution," a figure Supreme People's Court ("SPC") and Ministry of Justice officials stated was exaggerated. Foreign experts estimated that the country executed between 5 thousand and 12 thousand persons each year. A series of wrongful convictions in murder cases came to light in which innocent persons were convicted on the basis of coerced confessions.

The Government used incommunicado detention. The law requires notification of family members within 24 hours of detention, but individuals were

often held without notification for significantly longer periods, especially in politically sensitive cases.

The law forbids prison guards from extorting confessions by torture, insulting prisoners' dignity, and beating or encouraging others to beat prisoners; however, police and other elements of the security apparatus employed torture and degrading treatment in dealing with some detainees and prisoners. Officials acknowledged that torture and coerced confessions were chronic problems and began a campaign aimed at curtailing these practices. Former detainees credibly reported that officials used electric shocks, prolonged periods of solitary confinement, incommunicado detention, beatings, shackles, and other forms of abuse.

After a November visit, UN Special Rapporteur on Torture Manfred Nowak concluded that torture remained widespread, although the amount and severity decreased. He reported that beatings with fists, sticks, and electric batons were the most common tortures. Cigarette burns, guard-instructed beatings by fellow inmates, and submersion in water or sewage were also reported. Nowak further found that many detainees were held for long periods in extreme positions, that death row inmates were shackled or handcuffed 24 hours per day, and that systematic abuse was designed to break the will of detainees until they confessed. Procedural and substantive measures to prevent torture were inadequate. Nowak found that members of some house church groups, Falun Gong adherents, Tibetans, and Uighur prisoners were specific targets of torture.

During the year police continued to use torture to coerce confessions from criminal suspects, although the Government made efforts to address the problem of torture. A one-year campaign by the Supreme People's Procuratorate ("SPP") to punish officials who infringed on human rights, including coercing confessions through torture or illegally detaining or mistreating prisoners, ended in May. The campaign uncovered more than 3,700 cases of official abuse.

Petitioners and other activists sentenced to administrative detention also reported being tortured. Such reports included being strapped to beds or other devices for days at a time, beaten, forcibly injected or fed medications, and denied food and use of toilet facilities. A petitioner reportedly choked to death from force-feeding in a police-run psychiatric hospital in Beijing, according to a released inmate.

Conditions in penal institutions for both political prisoners and common criminals generally were harsh and frequently degrading. Prisoners and detainees often were kept in overcrowded conditions with poor sanitation. Prison capacity became an increasing problem in some areas. Food often was inadequate and of poor quality, and many detainees relied on supplemental food and medicines provided by relatives; some prominent dissidents were not allowed to receive such goods. Political prisoners were segregated from each other and placed with common criminals, who sometimes beat political prisoners at the instigation of guards. Newly arrived prisoners or those who refused to acknowledge committing crimes were particularly vulnerable to beatings. In January 2004 political dissident He Depu was reportedly

beaten by guards at Beijing No. 2 Prison and made deaf in one ear. Authorities acknowledged He's deafness, but asserted that he was already deaf when he entered prison. Prolonged use of electric shocks and use of a rack-like disciplinary bed were reported. Chinese prison management forced prisoners to engage in labor, both as punishment and a source of funding.

Officials confirmed that executed prisoners were among the sources of organs for transplant.

Transplant doctors stated publicly in 2003 that "the main source [of organ donations] is voluntary donations from condemned prisoners," but serious questions remained concerning whether meaningful or voluntary consent from the prisoners or their relatives was obtained.

Adequate, timely medical care for prisoners continued to be a serious problem, despite official assurances that prisoners have the right to prompt medical treatment.

Sexual and physical abuse and extortion were reported in some detention centers. Falun Gong activists reported that police raped female practitioners, including an incident in November at the Dongchengfang police station in Tunzhou City, Hebei Province, in which two women were raped while in detention. Forced labor in prisons and reeducation-through-labor camps was common.

The Government generally did not permit independent monitoring of prisons or reeducation-through-labor camps, and prisoners remained inaccessible to most international human rights

organizations. However, the Government hosted visits by the UN high commissioner for human rights and the UN special rapporteur for torture and permitted them to visit prisons. In July the Government and the International Committee of the Red Cross ("ICRC") agreed to terms permitting the ICRC to open an office in Beijing. The office opened, although the agreement did not grant the ICRC access to prisons.

Arbitrary arrest and detention remained serious problems. The law permits police and security authorities to detain persons without arresting or charging them. It also permits sentencing without trial to as many as four years in reeducation through-labor camps and other administrative detention. Because the Government tightly controlled information, it was impossible to determine accurately the total number of persons subjected to new or continued arbitrary arrest or detention. According to 2003 Government statistics, more than 260 thousand persons were in reeducation-through-labor camps. Foreign experts estimated that more than 310 thousand persons were serving sentences in these camps in 2003.

Among those specially targeted for arbitrary detention or arrested during the year were current and former China Democracy Party activists, Falun Gong practitioners, domestic and foreign journalists, unregistered religious figures, and former political prisoners and their family members.

Authorities arrested persons on charges of revealing state secrets, subversion, and common crimes to suppress political dissent and social advocacy. Citizens also were detained and prosecuted

under broad and ambiguous state secrets laws for, among other actions, disclosing information on criminal trials, meetings, and Government activity. The number of persons executed each year has been deemed by the Government to be a state secret. Information could retroactively be classified a state secret by the Government.

The law states that the courts shall exercise judicial power independently, without interference from administrative organs, social organizations, and individuals. However, in practice the judiciary was not independent. It received policy guidance from both the Government and the CCP, whose leaders used a variety of means to direct courts on verdicts and sentences, particularly in politically sensitive cases. At both the central and local levels, the Government frequently interfered in the judicial system and dictated court decisions. Trial judges decide individual cases under the direction of the trial committee in each court. In addition the CCP's law and politics committee, which include representatives of the police, security, procuratorate, and courts, had the authority to review and influence court operations at all levels of the judiciary; in some cases the committee altered decisions. Party and political leaders were known to instruct courts and judges on the handling of individual cases. People's congresses also had authority to alter court decisions, but this happened rarely. Corruption often influenced judicial decision-making and safeguards against corruption were vague and poorly enforced. The people's congresses appointed judges at the corresponding level of the judicial structure. Judges received their court finances and

salaries from those Government bodies and could be replaced by them. This sometimes resulted in local authorities exerting undue influence over the judges they appointed and financed.

There was no adversary system, no presumption of innocence, and judges and prosecutors typically used an inquisitorial style of questioning the defendant, who was often the only witness. The law affords no right to remain silent, no protection against double jeopardy, and no law governing the type of evidence that may be introduced.

The mechanism that allows defendants to confront their accusers was inadequate; according to one expert, only 1 to 5 percent of trials involved witnesses. Accordingly, most criminal trials consisted of the prosecutor reading statements of witnesses who neither the defendant nor his lawyer had an opportunity to question. Defense attorneys had no authority to compel witnesses to testify or to mandate discovery, although they could apply for access to Government-held evidence relevant to their case. In practice, pretrial access to information was minimal and the defense often lacked adequate opportunity to prepare for trial.

The law gives most suspects the right to seek legal counsel shortly after their initial detention and interrogation, although police often circumvented defendants' right to seek counsel. Individuals who faced administrative detention were not granted the right to seek legal counsel. Government-employed lawyers were often reluctant to represent defendants in politically sensitive cases and defendants frequently

found it difficult to find an attorney. In some sensitive cases, lawyers had no pretrial access to their clients, and defendants and lawyers were not allowed to speak during trials. In practice criminal defendants often were not assigned an attorney until a case was brought to court. Even in nonsensitive criminal trials, only one of every seven defendants had legal representation, according to credible reports citing internal Government statistics.

Although the Government did not publish a conviction rate, more than 98 percent of defendants whose cases were closed in 2004 were sentenced to criminal punishment; less than 0.5 percent of all defendants were found not guilty. In many politically sensitive trials, which rarely lasted more than several hours, the courts handed down guilty verdicts immediately following proceedings. Defendants who refused to acknowledge guilt often received harsher sentences than those who confessed. There was an appeals process, but appeals rarely resulted in reversed verdicts. Appeals processes failed to provide sufficient avenue for review, and there were inadequate remedies for violations of defendants' rights. Nationwide, original verdicts were changed on appeal in only 0.34 percent of all cases, including capital cases.

SPC regulations require all trials to be open to the public, with certain exceptions, such as cases involving state secrets, privacy, and minors. The legal exception for cases involving state secrets was used to keep politically sensitive proceedings closed to the public and in some cases even to family members. Some trials were broadcast, and court proceedings were a regular

television feature. A few courts published their verdicts on the Internet.

Police and prosecutorial officials often ignored the due process provisions of the law. The lack of due process was particularly egregious in death penalty cases.

Government officials continued to deny holding any political prisoners, asserting that authorities detained persons not for their political or religious views, but because they violated the law; however, the authorities continued to confine citizens for reasons related to politics and religion. Tens of thousands of political prisoners remained incarcerated, some in prisons and others in reeducation-through-labor camps and other forms of administrative detention. The Government did not grant international humanitarian organizations access to political prisoners.

Western NGOs estimated that approximately 500 persons remained in prison for the repealed crime of "counterrevolution," and thousands of others were serving sentences under the state security law, which Chinese authorities stated covers crimes similar to counterrevolution.

Amnesty International has identified more than 80 persons by name all of who remained imprisoned or on medical parole for their participation in the 1989 Tiananmen demonstrations; other NGOs estimated that as many as 200 persons remained in prison for political activities connected to the demonstrations.

Criminal punishments could include "deprivation of political rights" for a fixed period after release from prison, during which the individual is denied the

already limited rights of free speech and association granted to other citizens. Former prisoners also sometimes found their status in society, ability to find employment, freedom to travel, and access to residence permits and social services severely restricted. Former political prisoners and their families frequently were subjected to police surveillance, telephone wiretaps, searches, and other forms of harassment, and some encountered difficulty in obtaining or keeping employment and housing.

The law provides for freedom of speech and of the press, although the Government generally did not respect these rights in practice. The Government interpreted the CCP's "leading role," as mandated in the constitution, as circumscribing these rights. The Government continued to threaten, arrest, and imprison many individuals for exercising rights to free expression. Internet essayists and journalists in particular were targeted, including Hunan writer Shi Tao and New York Times employee Zhao Yan. The Government continued to control print, broadcast, and electronic media tightly and used them to propagate Government views and CCP ideology. Such controls tightened during the year, and new regulations made it increasingly difficult to express views that differed from those authorized by the Government on the Internet, through broadcast media and in print. Media outlets received regular guidance from the Central Propaganda Department listing topics that should not be covered, including politically sensitive topics. All media employees were under explicit orders to follow CCP directives and guide public opinion. These measures greatly restricted the freedom of journalists

and Internet writers to report the news and led to a high degree of self-censorship.

The scope of permissible private speech continued to expand. Political topics could be discussed privately and in small groups without punishment, and minor criticisms of the Government were common topics of daily speech. So long as the speaker did not publish views that challenged the Communist Party or disseminate such views to overseas audiences, the range of permissible topics for private speech continued to grow. However, public speeches, academic discussions, and speeches at meetings or in public forums covered by the media remained circumscribed. Those who aired views that disagreed with the Government's position on controversial topics risked punishment ranging from disciplinary action at Government work units to police interrogation and detention. These restrictions and more formal restrictions on freedom of the press and academic freedom had a chilling effect on freedom of speech.

The law provides for freedom of religious belief and the freedom not to believe. However, the Government sought to restrict religious practice to Government-sanctioned organizations and registered places of worship and to control the growth and scope of the activity of religious groups. The Government recognized five main religions: Buddhism, Taoism, Islam, Protestantism, and Catholicism. A Government-affiliated association monitored and supervised the activities of each of these faiths. Membership in these faiths as well as unregistered religious groups grew rapidly. The Government tried to control and regulate religious groups, especially

groups that were unregistered, to prevent the rise of sources of authority outside the control of the Government and the party.

The Government's respect for religious freedom remained poor, although the extent of religious freedom continued to vary widely within the country. Freedom to participate in officially sanctioned religious activity continued to increase in most areas. Religious activity grew not only among the five main religions, but also among Korean Christians, Russian Orthodox, and folk religions. Bibles and other religious texts were available in most parts of the country. At the same time, crackdowns against unregistered Protestants and Catholics, Muslim Uighurs, and Tibetan Buddhists continued. The Government continued its repression of groups that it determined to be "cults" and of the Falun Gong spiritual movement in particular.

V. FINDINGS AND ANALYSIS

A. Credibility

1. Respondent

I find the respondent credible on her applications for relief. Two witnesses and some documentation support her testimony. I recognize some variances between the respondent's testimony and the incident report submitted by the DHS at Exhibit 30. I find that this does not affect the respondent's overall credibility on the material aspects of her applications for relief.

Respondent' counsel should have provided translated copies of the Chinese language articles that the respondent prepared in her capacity of editor of an

online publication sponsored by the China Information Center prior to the hearing. But, I have no reason to doubt that these articles exist.[2]

2. Professor Cohen

Professor Cohen testified credibly.

3. Pastor Shaltanis

Pastor Shaltanis testified credibly.

B. Past Persecution

1. The Respondent Shows Past Persecution

a. PRC espionage conviction is persecution not legitimate prosecution

The DHS argues that the respondent's conviction for espionage in the PRC, resulting in a 10 year prison sentence, was a legitimate criminal prosecution. I disagree.

The Board and the Federal Courts long have recognized the distinction between prosecution for common crimes and politically-motivated prosecutions. *See, e.g., Menghesha v. Gonzales*, -F.3d- WL 598126 (4th Cir. 2006); *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996); *Matter of S-P-*, 21 I&N Dec. 486, 493 (BIA 1996); *Matter of Janus and Janek*, 12 I&N Dec. 866 (BIA 1968). The latter can constitute persecution.

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[2] The respondent did finally submit several articles that she wrote for Chinese internet publications as part of her response to the State Department letter. These unsolicited articles, which are neither newly discovered nor previously unavailable, only confirm the existence of what I had already assumed. I did not rely on the articles themselves in reaching my decision. I will, however, include the articles in the record for purposes of appellate review.

Punishment for a politically related act which is disproportionate to the crime is not legitimate prosecution, but rather persecution on account of political opinion. *Matter of S-P-, supra.*

The United Nations High Commissioner for Refugees, *Handbook on Procedures for Determining Refugee Status* (1979) ("*Handbook*") clearly draws such a distinction. *Handbook* ¶¶ 56-61, at 15-16. The *Handbook* points out that persecution might result from laws that do not conform to international human rights standards as well as discriminatory application of facially non-persecutory laws. *Id.* ¶ 59, at 16. The *Handbook* further notes that laws deeming dissemination of information to be an offense against "public order" often are used for purposes of political persecution. *Id.* The *Handbook* states that refugee adjudicators may use their own national laws and standards as yardsticks against which to judge foreign prosecutions. *Id.* 160.

This respondent was the victim of a classic politically-motivated prosecution by the PRC. Indeed, one-party totalitarian states such as the PRC are notorious for using largely trumped-up espionage charges to punish and discredit actual, perceived, and potential critics and to send messages to others about the dangers of political dissent.

For example, the Chinese court record shows that the respondent was convicted for international dissemination of things such as "speeches by our country's leaders concerning the work regarding Taiwan, and articles in international periodicals published by the Xinhua News Agency, the People's

Daily, and the All-China Taiwanese Compatriots Federation." (GRX 4, T-l 1). This is hardly "espionage" by U.S. or any accepted international standards, whatever internal controls the PRC may impose to suppress its citizens' freedom of expression.

The excerpts from the 2005 Country Report set forth above show that the PRC does not have an independent judiciary and that the justice system is highly skewed toward the Government and against individuals on all levels. This is borne out by the respondent's credible testimony about her treatment from her arrest in the PRC up until her conviction, as well as by Professor Cohen's expert testimony. Further, the State Department, in its response, found the respondent's "brief trial notably lacking in due process." (X32).

I have considered the DHS's response to the State Department letter. I disagree with the DHS's contention that the State Department letter does not support that the respondent's political opinion was at least one central reason for her detention in the PRC. While the DOS letter states that it does not know the reasons for the respondent's detention and trial, it does not preclude a finding that the respondent's actual or political opinion was at least one central reason for her detention and harm.

Further, the State Department did not have the benefit of the entire record, including the live testimony before me, to determine the likelihood of the respondent's farther imprisonment. The DOS letter is not inconsistent with the respondent's claim.

For the foregoing reasons, I find that the PRC's action against the respondent was not a legitimate criminal prosecution, but rather a politically-motivated action designed to punish the respondent for disseminating information within the international scholarly community and deter others from freely expressing views and ideas that might be used to criticize the Government of the PRC. In other words, the PRC acted to suppress and discourage the respondent's actual or imputed expression of political views as part of her scholarly work. The PRC's espionage prosecution of the respondent was an act of political persecution. *See Menghesha v. Gonzales*, *supra*. I therefore find that the respondent's actual or imputed political opinion was at least one central reason for her persecution.

b. Respondent's harm in PRC rises to the level of past persecution

The respondent testified in detail about the meaningful threats and psychological coercion she received during her 166 days of detention in the PRC. The respondent also described her treatment in writing in an article entitled "My Ordeal," published in the September 16, 2001 edition of *The New York Times*. (GRX 26, T-H5).

The respondent was not physically harmed. But, she was subjected to highly coercive psychological treatment meant to break her will and force her to confess. She was held for 166 days without contact from her family and with only very limited contact with her Chinese defense lawyers. She was subjected to repeated 10 hour interrogation sessions that

included threats to punish her and her family in the PRC if she did not confess to wrongdoing. She was forced to undergo "board sitting" to "contemplate the crimes she had committed." She received inadequate time to prepare her defense and, after a 3-hour trial, was given a disproportionate 10-year prison sentence, which shocked her. She became depressed and felt herself abandoned.

The DHS argues that the respondent's Chinese lawyer characterized her treatment as good and that Professor Cohen indicated that the respondent had been treated better than the average prisoner in the PRC during her pre-trail detention by the State Security officials. But, this is certainly damning with faint praise, given the grim nature of the PRC's prison system, as documented in the Country Report. Moreover, the respondent's Chinese lawyer was part of a government-dominated justice system where any open criticism of the Chinese Government could be highly problematic for both the lawyer and his client.

Serious threats and coercion short of physical harm, particularly by those having a demonstrated ability to make good on them, can rise to the level of persecution. *See Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000). A reasonable person in the respondent's situation would be psychologically harmed and feel punished by the treatment visited on the respondent by the PRC.

For the foregoing reasons, I find that the respondent suffered harm rising to the level of past persecution on account of actual or imputed political opinion as a result of her politically-motivated trial,

conviction, 10 year sentence, repeated interrogations, and 166 day detention in the PRC.

2. The DHS Fails to Rebut the Presumption of Future Persecution

The DHS fails to rebut the regulatory presumption of future persecution by showing fundamentally changed circumstances or a reasonably available internal relocation alternative that would eliminate the respondent's reasonable fear of future persecution. Since the time of her release from custody on "medical parole," the respondent's situation in relation to the Government of the PRC has actually become materially worse for four reasons.

First, in violation of the parole agreement that she was forced to signed as a condition of her release by the PRC, the respondent publicly spoke out about the details of her treatment while in detention. *See, e.g.*, GRX 26, T-H5 (*New York Times* article), T-H6 (various articles about her return to the United States, including one from *The New York Times*, July 27, 2001, with caption "Freed Scholar, Still Defiant, Returns to U.S. – Warned to Keep Quiet, She Talks to the Media").

Second, in published articles, the respondent has been openly critical of the policies of the PRC Government. For example, in the previously-mentioned *New York Times* article she stated:

> Beneath the rapid economic growth, beneath the smiles of Chinese officials and the handshakes with international leaders, China's political and ideological system remains unchanged. China is

> still a dangerous place, not only for dissidents, but for anyone interested in the free exchange of ideas.

(GRX 26, T-H5, at 39).

In another article published in *The Washington Times* on October 21, 2001, entitled "Changing Strategy of a Smart Chameleon," the respondent states:

> But China does have a different understanding of terrorism and China does administer different brands of honor to its own people and the world. China tends to view all that hold different social, political, and religious stances as its enemy, therefore a threat, a terrorist kind, to its tyrannical control. China's own brand of terrorism is political terrorism. Over the past 50 years, 30 million to 50 million people were persecuted for having different political views. Next to the Soviet Union, which committed terror against the Russians for more than seven decades, China has been in the terror business for over five decades.

(GRX 27, T-F, at 56).

Third, the respondent's cooperation with the U.S. Government in investigating illegal exports to Chinese Government-controlled entities, as part of her criminal plea bargain, was highly publicized. For example, one BBC article dated November 26, 2003 states that "she has been helping the U.S. identify those in the Chinese Government who are seeking to import controlled goods." (GRX 26, T-H3, at 32).

Fourth, and very significantly, as a result of her criminal activities the respondent has very visibly lost

the support of the U.S. Government, which was the primary reason she was saved from further imprisonment in 2001. The respondent's illegal export activities also appear to have cost her the support of the international scholarly community which previously, quite vocally and effectively, had rallied to her cause. Notably, the State Department's response does not indicate that the respondent would not be subject to harm in a PRC prison because of her high-profile, or that the U.S. Government would seek formal assurances to protect the respondent from possible harm. (X 32).

For all of the foregoing reasons, the DHS fails to rebut the presumption. Consequently, the regulatory presumption of future persecution in the PRC applies to the respondent.

C. Withholding of Removal Under Section 241(b)

The respondent qualifies for a grant of withholding of removal to the PRC under section 241(b)(3) of the Act on the basis of the unrebutted regulatory presumption of future persecution.

Additionally, even without the regulatory presumption, I find that the respondent more likely than not will be persecuted on account of political opinion if returned to the PRC. As I have found above, the respondent remains subject to a 10-year prison sentence as a result of a politically-motivated conviction in the PRC, a country well-known for its intentional mistreatment of actual and perceived political dissidents. As documented in the 2005 Country Report, the conditions in Chinese prisons are atrocious. For the four reasons listed under part

IV(B)(2) above, the respondent probably will be required to serve some or all of her 10-year sentence if returned to the PRC at present. I therefore also independently conclude that the respondent has shown a clear probability of future persecution on account of political opinion if returned to the PRC.

D. Relief Under Article 3 of the CAT

I find that the respondent more likely than not will suffer torture if returned to the PRC. The State Department's response, the 2005 Country Report and the testimony of Professor Cohen establish that torture is widespread throughout the Chinese prison system. I agree with Dr. Cohen's conclusion that: "There is a high probability, absent the most formal assurances by the Chinese Government, that she will be subjected to long-term imprisonment and, a high risk of torture or other severe physical abuse." (GRX 27, T-C, at 14).

The State Department response acknowledges that "torture does take place in Chinese prisons," and notes that the UN Special Rapporteur on Torture concluded after visiting the PRC that torture was "widespread." (X 32). The UN Special Rapporteur on Torture reported beatings with fists, sticks, and electric batons, as well as cigarette burns, guard-instructed beatings by fellow inmates, and submersion in water or sewage. (X 33).

In addition to the reasons previously mentioned in my discussion of the probability of persecution, the respondent's Christian beliefs, which I find to be sincere, would likely cause conflicts with the authorities during any long-term imprisonment and

would be a further reason for them to subject her to the worst kind of treatment offered in the Chinese system – torture.

The type of systematic beatings of prisoners in the PRC by other prisoners, at the instigation of the guards, clearly is torture and goes far beyond the type of "routine police brutality" that the Board found not to be torture in the context of Haitian prisons in *Matter of J-E-, supra*. Because the respondent has already been convicted and sentenced, for politically-motivated reasons, her torture is much more predictable than that of the Nigerian woman who unsuccessfully sought CAT protection in *Matter of M-B-A-, supra*. This respondent's case is much closer to the situation of the respondent in *Matter of G-A-, supra*, who was granted CAT protection from removal to Iran.

The U.S. Government has not secured "a diplomatic assurance against torture" in this case as provided in 8 C.F.R. § 208.18(c) (markedly absent from the State Department's response is any indication that the U.S. Government would attempt to get a formal assurance). Such assurance would, of course, remove my jurisdiction over the respondent's CAT claim.

In its response to the DOS letter, the DHS argues that the DOS "[could not] say with certainty, whether [the respondent] might be tortured." However, the DOS did conclude that torture is "widespread" in Chinese prisons. (X 32). Further, the DHS misstates the respondent's burden. The respondent need not prove that she would certainly be tortured upon return to the PRC. Rather, she must prove that she would

probably be tortured. I find that there is at least a 51% possibility that the respondent would be tortured by the Chinese Government if forced to return to the PRC.

For the foregoing reasons, I find that the respondent's removal to the PRC should be withheld under Article 3 of the CAT and the implementing regulations. Alternatively, the respondent would be entitled to deferral of removal to the PRC under the CAT.

E. Asylum Analysis

1. Extraordinary Circumstances

To this date, the respondent remains in lawful status as a lawful permanent resident. Therefore, she falls squarely within the definition of "extraordinary circumstances" under 8 C.F.R. § 208.4(a)(5)(iv) which warrants filing of her asylum application more than one year after her last arrival in the United States.

Moreover, only with the April 1, 2005 service of the Notice to Appear did the respondent become reasonably aware that the DHS did not intend to follow the U.S. Attorney's non-binding recommendation that she be allowed to remain in the United States. At the first Master Calendar held on April 13, 2005, the respondent made a futile attempt through prior counsel to obtain release on bond. Shortly thereafter, however, current counsel entered the case and announced the respondent's intention to seek asylum, among other forms of relief. By agreement of he parties, with my approval, the respondent was not required to file her applications for relief during the period of months when the complex

issues relating to her admissibility and eligibility for relief were being litigated. The respondent filed her application within the time deadlines that I established. Consequently, I find that the respondent acted in a diligent and completely reasonable manner to apply for asylum at the earliest time possible under the unusual circumstances of this case.

2. Well-Founded Fear/Objectively Reasonable Basis

Because the respondent meets the higher legal standard for proving future persecution in the context of withholding of removal under section 241(b)(3), on the basis of both the regulatory presumption and my independent probability analysis, she also has a well-founded fear of future persecution for asylum purposes. The remaining question is whether she deserves my favorable exercise of discretion.

3. Discretion

The respondent has committed two relatively recent Federal felonies that show her serious disregard of the best interests of the United States in favor of her own greed. As a result of these convictions and her 7-month criminal incarceration, the respondent lacks statutory good moral character under section 101(f) as I previously have found.

In the overall course of her illegal export business, the respondent has demonstrated a deceitfulness, manipulative character, and a willingness to place others at risk that deserve condemnation. I have no way of quantifying the extent of the problems caused by the respondent's illegal shipments of controlled items to the PRC. The respondent's conduct can be

characterized as an "egregious adverse factor" that could warrant a discretionary denial of asylum under *Matter of Kasinga, supra.*

On the other hand, the respondent is the mother of three young United States citizen children who are innocent of any wrongdoing. Her husband is a United States citizen, although his equities are diminished somewhat by his own criminal participation in the respondent's tax fraud. The respondent faces severe persecution, amounting to torture, if returned to the PRC.

The respondent is a first-time offender who has lived in the United States since 1989 and has worthwhile scholarly contributions to her name. She already has paid a heavy price for her misconduct: loss of reputation, separation from her family, professional and personal humiliation, and continuous confinement that has now reached 18 months and still counting. The respondent did provide "substantial assistance" to the U.S. Government following the discovery of her illegal conduct, although it was only to improve her own position that she did so. Although very serious, the respondent's misconduct was not of a character that would virtually preclude a favorable exercise of discretion on asylum under the Attorney General's decision in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

Given the humane purposes of asylum law, I find that at present the public interest would best be served by giving the respondent a chance to make good on her promise to redeem herself and live a worthy future life. I believe that the respondent can and will

achieve this potential. I therefore will grant her application for asylum.

By doing so, I confer on the respondent a "probationary" legal status that will require her in the future to appear before an obviously highly skeptical DHS and establish her meritorious conduct and worthiness if she intends to re-acquire her lawful permanent resident status. *See* section 209(b) of the Act. In the meantime, any further transgressions by the respondent will almost certainly have traumatic adverse consequences for her and her family.

D. Discretionary Denial of Waivers

I reach a different conclusion on the respondent's request for discretionary waivers that would allow her to retain her current lawful permanent resident status. The respondent had this great privilege and abused it by putting her own selfish interests above those of our country. She has caused substantial problems and diversion of time and resources for a number of critically important U.S. Government agencies.

While I am hopeful that the respondent will redeem herself in the future, at present she does not deserve to continue in her lawful permanent resident status. I therefore will exercise my discretion to deny her applications for cancellation of removal and a waiver under section 212(h). My action, if affirmed on appeal, will result in termination of the respondent's current lawful permanent resident status.

VI. CONCLUSION

I find that the respondent is an arriving alien who is removable on the two crime involving moral turpitude charges, but not removable under 212(a)(3)(A)(i)(II). I find her credible with respect to her applications for relief. On the basis of her credible testimony and other evidence, I grant her applications for asylum, withholding of removal to the PRC under section 241(b)(3), withholding of removal to the PRC under the CAT, and, alternatively, deferral of removal under the CAT. I exercise my discretion to deny her applications for cancellation of removal under section 240A(a) and waiver of inadmissibility under section 212(h), thereby terminating her lawful permanent resident status.

ORDER

It is Ordered that: The respondent's application for asylum under section 208 of the Act is **GRANTED**.

It is Further Ordered that: The respondent's removal to the PRC shall be **WITHHELD** under section 241(b)(3) of the Act.

It is Further Ordered that: The respondent's removal to the PRC shall be **WITHHELD**, or in the alternative **DEFERRED**, under Article 3 of the CAT.

It is Further Ordered that: The respondent's applications for cancellation of removal under section 240A(a) of the Act and waiver of inadmissibility under section 212(h) of the Act are **DENIED**.

Paul Wickham Schmidt
United States Immigration Judge
Date: 3/20/06

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
901 North Stuart Street, Suite 1300
Arlington, Virginia 22203

IN THE MATTER OF:	)	**IN REMOVAL**
PROCEEDINGS		
GAO, ZHAN,	)	
	)	File No.: A#70-519-150
RESPONDENT	)	
	)	
	)	
	)	

CHARGES: Section 212(a)(3)(A) of the Immigration and Nationality Act ("INA" or "Act"), as amended, as an alien who, the Attorney General knows, or has reasonable ground to believe seeks to enter the United States to engage solely, principally or incidentally in: (i) any activity (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information.

Section 212(a)(2)(A)(i)(I) of the Act, as amended, as an alien who, has been

convicted of, or who admits having committed or who admits committing the act which constitute the essential elements of a crime involving moral turpitude.

APPLICATIONS: None at this hearing

APPEARANCES

ON BEHALF OF RESPONDENT:

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THIRD ORDER: REMOVABILITY UNDER 212(a)(3)(A)(i)(II)

I. INTRODUCTION

The respondent, a married female native and citizen of the People's Republic of China ("PRC"), is a returning lawful permanent resident alien. In my First Preliminary Order of August 11, 2005 and my Second Preliminary Order of September 23, 2005, I found, among other things, that she is properly charged as an arriving alien and that she is inadmissible and therefore removable on each of the two crime involving moral turpitude charges brought against her by the DHS. I incorporate those decisions by reference.

At this hearing, I will resolve the remaining charge that the respondent is inadmissible and therefore removable from the United States under section 212(a)(3)(A)(i)(II) of the Act because there is reasonable ground to believe that she seeks to enter the United States solely, principally, or incidentally to engage in an activity to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information. For the reasons set forth in this opinion, I find this charge not sustained. Consequently, I will allow the respondent to apply for asylum withholding of removal, cancellation of removal, and a section 212(h) waiver in addition to relief under Article III of the Convention Against Torture ("CAT") during the "relief phase" of these proceedings commencing on February 13, 2006.

II. ISSUE

The respondent has been a lawful permanent resident since September 28, 1993, is married to a U.S. citizen, has three U.S. citizen children (two of them very young), has a residence in the United States, and has engaged in a wide range of lawful activity during her residence in the United States. Consequently, the respondent clearly does not seek to enter "solely or principally" to engage in unlawful export activities. Any future unlawful activity would be incidental to the respondent's other, legitimate, reasons for presence in the United States.

I must therefore decide whether, in addition to her legitimate reasons for seeking reentry into the United States, a reasonable person would believe that the respondent in the future, at least incidentally, will

engage in unlawful export activities in the United States as charged by the DHS.

III. LEGAL STANDARDS

I find little published guidance on the standards to apply in adjudicating a section 212(a)(3)(A)(i)(II) charge in the context of a returning lawful permanent resident such as the respondent. Therefore, I will formulate a standard from existing case law.

Because the respondent is a returning lawful permanent resident alien, the DHS bears the burden of proof. *See Matter of Kane*, 15 I&N Dec. 258 (BIA 1975). The Attorney General interprets the statutory term "reasonable ground to believe" as meaning "information that would permit a reasonable person to believe." *Matter of A-H-*, 23 I&N Dec. 774,788-89 (A.G. 2005). This describes the standard of proof that the DHS must meet. In other words, the DHS must show that a reasonable person would believe that the respondent will engage in unlawful export activities in the United States.

In meeting its burden, the DHS is entitled to a rebuttable presumption, arising from the respondent's 2004 conviction for felony unlawful export of commerce control items, that she will continue to engage in unlawful export activities in the United States. *Cf. Beslic v. INS*, 265 F.3d 568 (7th Cir. 2001). In the absence of evidence rebutting this presumption, the DHS would meet its burden of proof.

My determination in this case involves a prediction of the respondent's future conduct. Ultimately, I must determine, on the record as a whole, whether a reasonable person would believe that

the respondent in the future will engage in unlawful export activities in the United States. I believe that the DHS should bear the ultimate burden on this question. However, in this particular case the placement of the ultimate burden is immaterial. I would reach the same result regardless of who bears the ultimate burden.

IV. HEARING BACKGROUND

A. Focus on Post-July 26, 2001 Activity

On March 5, 2004, the respondent was convicted by the U.S. District Court, Eastern District of Virginia, for unlawful export of commerce control list items and tax fraud, both felonies. (GRX2, T-1). The respondent agreed to plead guilty to those offenses, and the record of conviction contains a 7-page, 20 paragraph Statement of Facts stipulated by the parties to the criminal case. (GRX2, T-2). I hereby adopt the Statement of Facts as part of my findings in this proceeding.

The Statement of Facts described in some detail the respondent's criminal conduct from at least mid-2000 through at least January 2001. I did not intend to retry the respondent's criminal case. Also, the respondent was in the PRC from January 20, 2001 until July 26, 2001. Consequently, I asked the parties to concentrate in this hearing upon the respondent's conduct following her return to the United States on July 26, 2001 up until the present.

B. Evidence and Testimony

The parties submitted more than 300 exhibits, covering more than 1000 pages. Apparently, these

exhibits consist largely of materials seized by law enforcement authorities when they executed a search warrant at the respondent's residence on February 25, 2002. These materials were turned over to the United States Attorney for the Eastern District of Virginia

I also heard approximately 18 hours of testimony. The DHS presented: Senior Special Agent Joseph Bankins from the Department of Commerce, Office of Export Enforcement; Dr. Richard Jones from the Defense Technology Security Administration ("DTSA"); Senior Intelligence Officer Michael Danis from the Defense Intelligence Agency ("DIA"); Special Agent Christine Marrion from the Defense Criminal Investigative Service ("DCIS"); and Special Agent David Guerrant from the DHS's U.S. Immigration and Customs Enforcement ("ICE"). The respondent testified and also presented the testimony of her husband's criminal defense attorney, Mr. Alan Yamamoto.

C. Translation Issues

In the case of any disputed Chinese translations, by agreement of the parties, I used the translations presented by the respondent.

D. United States Attorney McNulty's Letter

On January 19, 2005, Paul J. McNulty, United States Attorney, Eastern District of Virginia (Mr. McNulty is currently the Acting Deputy Attorney General) wrote a letter to the Chief Counsel of the DHS in Arlington, Virginia. (GRX5, T-6). In that letter, Mr. McNulty: 1) states that his office recommended to the U.S. District Court a downward departure from sentencing guidelines because the

respondent provided "substantial assistance" in the investigation of others who had committed crimes; 2) recommends and entreats the DHS not to deport the respondent for reasons related to her unlawful export conviction; and 3) acknowledges that his recommendation is not binding on the DHS.

I do not believe that Mr. McNulty would have written this letter if he had any reason to believe that the respondent would engage in future recidivist conduct. Mr. McNulty has neither withdrawn nor qualified this letter.

E. Judge Ellis's Order

The respondent submits the January 20, 2006 order of United States District Judge T.S. Ellis, III in *U.S. v. Donghua Xue*, Cr. No. 1:03cr334. (GRX21, T-83). Mr. Xue is the respondent's husband. In that order, Judge Ellis provides an addendum of approximately two pages specifically for my information and use in the respondent's case. Judge Elliott says that "Ms.Gao [the respondent] was sentenced to seven months of imprisonment, to be followed by eight months of community confinement, a sentence substantially below the applicable sentencing guidelines range."

Judge Ellis further states "that at the time of Ms. Gao's sentencing, the Court allowed her to surrender voluntarily for her sentence and to remain free on conditions for a period of three months, which period was later extended to six months, to permit Ms. Gao to continue nursing her infant son. [citation omitted] Obviously, had this Court considered Ms. Gao a threat

to national security, self-surrender and a stay of her sentence would not have been appropriate."

Further, Judge Ellis informs me that the DHS's decision to detain the respondent for removal proceedings disrupted the sentencing scheme he had devised, in connection with Mr. Xue's interrelated offense of failure to report income, to guarantee that Ms. Gao's minor children would have a parental caregiver present at all times. This, in turn, made it necessary for Judge Ellis to further stay Mr. Xue's sentence and vacate the community confinement portion of the respondent's sentence.

Finally, Judge Ellis states that:

> At no time has the government, by counsel, in either Ms. Gao's case or Mr. Xue's case urged, argued, or stated that Ms. Gao posed a threat to national security. Had such an argument been made by the government, the Court would not have stayed the service of Ms. Gao's sentence, reduced her sentence, or allowed her to remain free on conditions to nurse her infant child.

I do not believe that Judge Ellis would have taken the actions he describes if, on the basis of the material submitted to him by the Government, he had any reason to believe that the respondent would engage in future recidivist conduct.

V. FINDINGS OF FACT

A. Overall Factfinding

On the basis of the evidence and testimony before me, I make the following findings of fact.

1. Respondent's Background

The respondent is a 45-year-old married female who was born in the PRC. She and her husband were married in the PRC in 1987. The respondent holds an M.A. degree in comparative Literature and a Ph.D. degree in sociology from Syracuse University awarded in 1997. (GRX4, T-12).

The respondent first entered the United States in 1989 as a student to attend Syracuse University. The respondent obtained lawful permanent resident status, apparently through her husband, on September 28, 1993.

The respondent has scholarly credentials and has worked as part-time editor, freelance commentator, and occasional op-ed writer. However, in addition to her husband's salary, her major source of earned income in the United States has been from her activities in the trade of technology between the PRC and the United States, which she conducted from approximately 1993 until approximately February 25, 2002 when U.S. Government agents executed a search warrant at her residence and seized certain business-related materials.

2. Respondent's Customers in the PRC

Among the respondent's Chinese customers were research institutes known as the "14th Institute," the "20th Institute," and the "29th Institute" and various trading companies and "doing business as entities" owned or controlled by these Institutes. The respondent's husband formerly worked for the 20th Institute. (GRX7).

Each of the foregoing Institutes worked on military and non-military projects. (GRX8, T-60). However, the military focus was omnipresent at all three Institutes. Given the pervasive nature of government in the PRC's one-party totalitarian system, there is certainly no assurance that any product, even one intended solely for non-military applications, would not be utilized for a military purpose.

3. U.S. Export Controls

At least in part because of the danger of misuse by foreign nationals of exported U.S. technology, particularly for military purposes, the U.S. government employs an export control system, administered through the U.S. Department of Commerce and the U.S. State Department. This system bans or requires appropriate licenses or waivers for export to the PRC of certain technology-related products and/or products intended for certain end users in the PRC.

4. Respondent's Business Practices

The majority of the respondent's trade with the PRC did not violate any Federal export laws. However, the respondent routinely employed a number of dishonest and unethical practices in her business. These included using aliases to obtain quotes and order products from U.S. manufacturers and suppliers, using ruses in her business, and falsely claiming to be associated with research laboratories associated with U.S. universities. (GRX7).

The latter misrepresentation served a dual purpose. It permitted the respondent to receive a

substantial discount on the products to which she was not entitled. (GRX8, T-71). It also misled the U.S. suppliers into believing that the products being sold were intended for a U.S. end user which would not require an export license.

5. Respondent's Knowing Violation of Export Controls

Most seriously, according to the U.S. District Court transcript, the respondent consciously decided not to inquire about U.S. export licensing requirements. (GRX4, T-12). She did this because she believed that licenses would not be granted for some of her exports to the PRC. This, in turn would have prevented her from selling these products to entities in the PRC.

At least one of the respondent's regular suppliers, Richardson Electronics, Ltd., specifically informed the respondent in writing in February 2001, that an export license was required for export of certain products ordered by the respondent under the name of "University Laboratories." (GRX13, T-231). Product MAAM 7110, Broadband Amplifier, was one of the products covered by this written notice. Such notice by the supplier to the respondent was not legally required. The respondent disregarded that notice, claiming that she did not read everything on her invoices.

6. Competitive Advantages of Unlawful Conduct

The respondent's deceptions, particularly her knowing avoidance of licensing, offered her obvious commercial competitive advantages. She could sell

certain products at a very substantial markup to her PRC customers who could not purchase them directly from U.S. manufacturers or suppliers because of the export licensing requirements.

She could also sell her PRC customers an expanded line of technology products that no legitimate U.S. trading company who complied with the export licensing requirements could match. This advantage undoubtedly assisted the respondent's sale of unrestricted products to the PRC and correspondingly increased her profits.

7. Respondent's Financial Practices

The respondent also deposited the proceeds of her trade in a number of U.S. bank accounts, thereby making the money difficult to trace. In this connection, she made unauthorized commercial use of the bank account of the Chinese Scholars of Political Science and International Studies, Inc. ("CSPSISI"), a nonprofit organization of which she had once been treasurer. (GRX2, T-2).

8. Respondent's Unlawful Conduct Up to January 2001

According to the record of conviction, from at least mid-2000 until at least January 2001, the respondent knowingly and willfully exported and caused to be exported from the United States to the PRC items which were designated, for national security reasons, on the Department of Commerce's Commerce Control List without having first obtained from that Department a license or other written authorization for such export. (GRX2, T-2).

That record also shows that the respondent received wire transfers from "China National," an entity known to have connections with the PRC military, and to be involved in the acquisition of products and technology useful in the development of military and non-military applications. (GRX2, T-2; GRX4, T-12). The respondent also entered into contracts with the 14th Institute, an entity involved in the development of radar systems for the military of the PRC, as well as the development of civilian radar and air traffic control systems.

Among the items the respondent illegally exported to a subsidiary of China National were sophisticated military microprocessors, designed for aircraft, which can be employed in navigation, digital flight control and weapons fire control systems, radar data processing, and airborne battle management systems. These microprocessors can also perform target identification and discrimination functions in missiles, allowing the missile to home in on and destroy its target. These microprocessors may also have non-military applications, including applications in commercial aviation.

According to the probation report submitted to the U.S. District Court ("probation report"), the respondent made at least 15 prohibited shipments in the course of her offenses. (GRX7). The record further shows that the respondent concealed from the Government payments to her and her husband from a subsidiary of China National. All of the respondent's post-July-2001 shipments are reflected in the probation report which was used by the U.S. District Judge in sentencing the respondent.

9. Respondent's Trip to the PRC

On January 20, 2001, the respondent, her husband, and their U.S. citizen son departed to the PRC for a family visit. At that time, the respondent carried with her two un-licensed controlled items, DCP-1, Digital Chirp Synthesizers, which she delivered to the Nanjing Sunsea Industry Corporation (also "NSIC"), through which the 14th Institute conducts business. (GRX13, T-88, 166, 188); Court Facts, par. 4).

Upon attempting to return in February 2001, the family was detained by the PRC authorities. The respondent's husband and son were released after 26 days. But, the respondent was detained and eventually charged with espionage on behalf of Taiwan. The respondent's detention spurred criticism by the U.S. Government. President Bush and then-Secretary of State Colin Powell spoke out in her behalf.

On July 24, 2001, the respondent was convicted by the PRC government of espionage and was sentenced to 10 years in prison. On July 25, 2001, the respondent was released by the PRC largely because of diplomatic pressure by the U.S. Government on her behalf. Ostensibly, however, the PRC released her for health reasons. During her detention by the PRC, the respondent was able to communicate by fax with her husband and directed him to conduct some business activities, including shipment of some controlled items. (GRX13, T-l 88).

10. Respondent's Return

Upon return to the United States on July 26, 2001, the respondent was paroled into the United States

rather than being re-admitted as a lawful permanent resident. (GRX4, T-l6,17,18). Unknown to the respondent, in the fall of 2000, the U.S. Customs Service, now ICE, had received a complaint from a U.S. manufacturer about the respondent's export activities. (GRX2, T-2). ICE and the DCIS thereupon conducted an extensive investigation.

11. Respondent's Post-Return Business

After returning, the respondent resumed her dishonest business practices. Apparently, the respondent's business volume was substantially reduced. But, that was not necessarily the result of any conscious decision on the respondent's part. Notwithstanding her attempts through her husband to continue some business functions during her Chinese detention, that detention undoubtedly put a crimp in her business. The respondent was dealing with immigration and family issues upon her return and had become a "mini-celebrity" as a result of her well-publicized detention, conviction for espionage, and subsequent release. Presumably, all of these things detracted from the respondent's ability to do business.

The respondent continued her standard business practice of conscious non-compliance with U.S. export licensing requirements. By then, she had in her possession the invoice from Richardson Electronics, Ltd. providing written notice that products she ordered were subject to export licensing requirements. She continued to use aliases, even devising several new ones, and continued to misrepresent her associations with U.S. university laboratories. (GRX13, T-124). According to her testimony, she

devised new "ruses" to mislead customers as to her future intentions.

The respondent says she faced some "moral dilemmas." But, these were solely of her own making, resulting from her basically deceptive business practices. At no time prior to the February 25, 2002 raid on her home did the need to comply with U.S. export licensing requirements enter into the respondent's moral equation. This was notwithstanding her acknowledgment that the United States government had been responsible for her release by the PRC.

The respondent did not clearly inform either her customers or suppliers of any intention to cease her trading business with the PRC. While the respondent points to certain ambiguous language in some of her correspondence as evidence of her intention to quit business, only the most tortured reading of the passages she cites could produce that impression. Making due allowances for translation issues, the clear tenor of the respondent's post-return and pre-raid business correspondence is that she intended to continue her trade with the PRC and that she remained open to new trade opportunities.

The respondent's incentive for continuing her trading business is readily apparent. She had taken out substantial personal loans from entities in the PRC. These entities now were demanding repayment and apparently were harassing the respondent's family members in the PRC. The respondent had a continuing need for quick cash.

12. Respondent's Post-Return Shipments to the PRC

As she freely admits, the respondent made seven shipments to the NSIC, that is the 14th Institute, in the PRC between November 2001 and January 2002. (GRX14, T-24).

One of the November 2001 shipments involved an export controlled item, 100 units of MAAM 7110, Broadband Amplifiers. During the hearing, the respondent initially took the position that this shipment was exempt from export control requirements. But, the DHS's expert witness, Dr. Jones, convincingly refuted that claim. While Dr. Jones acknowledged that this product was subsequently removed from the controlled items list, that is irrelevant to my determination. It clearly was a controlled item at the time the respondent shipped it.

That the other six post-return shipments to NSIC did not violate U.S. export restrictions is more a matter of luck than virtue on the respondent's part. She consciously avoided checking U.S. licensing requirements at all relevant times. Therefore, she would have shipped these items to NSIC without regard to any prohibitions in U.S. law.

At the time of the raid, the respondent possessed several export controlled DCP-1, Digital Chirp Synthesizers. These are the same types of items that she hand delivered during her ill-fated 2001 trip to the PRC. The respondent says that these items malfunctioned after delivery to her PRC customer, and that she therefore had them repaired by the U.S. manufacturer pursuant to her original sales

agreement with the PRC customer. While the respondent had not yet shipped the DSP-1 units back to the PRC at the time of the raid, there is every reason to believe that she would have done so had they not been seized by the Government.

The respondent claims that her post-return shipments were not "new" but rather were pursuant to "pre-existing" or "modified" contracts. (GRX 13, T-123), I find these distinctions meaningless in the context of this case. The respondent's unlawful trade activities, which she clearly continued even after return, did not become lawful merely because they were part of a prior or modified unlawful arrangement rather than a new unlawful arrangement.

13. Respondent's Cooperation With the Government

Following the raid, the respondent realized that she was in trouble. The Government's action effectively and permanently terminated her viable trading activities.

Acting in her own self-interest, the respondent offered cooperation with the Government in an effort to achieve a more favorable outcome in her criminal case. The respondent was debriefed on approximately eight occasions by the U.S. Attorney, and agents of the ICE, DIA, DCIS, and the FBI. Not all of these entities were represented at all meetings.

Mr. Danis of the DIA, Special Agent Marrion of the DCIS, and Special Agent Guerrant of ICE all sincerely believe that the respondent's cooperation was less than it should have been and was of limited law enforcement value. All three of these witnesses were

strongly opposed to the downward departure for the respondent and believe that the U.S. Attorney should not have recommended it. However, they have no knowledge of the contents of the FBI's confidential letter regarding the respondent's cooperation which was given to the U.S. Attorney who transmitted it to Judge Ellis.

Special Agent Marrion and Special Agent Guerrant also believe that the respondent failed to follow their instructions and was improperly "freelancing" during part of her period of cooperation. However, the U.S. Attorney was ultimately in charge of the respondent's cooperation. As far as I can tell, the U.S. Attorney was aware of the respondent's post-raid activities, and any apparent trade-related actions she took during her period of cooperation were part of her effort to provide information that would allow her to obtain a reduced sentence. I have no reason to believe that the respondent intended to re-institute her unlawful trade activities during her period of cooperation with the U.S. Attorney.

14. Downward Departure in Sentencing

In sentencing the respondent on March 5, 2004, Judge Ellis found that she was entitled to a 7 level reduction in sentence upon the Government's motion for downward departure pursuant to 5K1,1 of the Sentencing Guidelines. (GRX2, T-l). He found that the basis for the departure was "as a result of the respondent's substantial assistance." Therefore, it is a judicially found fact that the respondent provided "substantial assistance" to the Government. I have neither authority nor any reason to question that fact

in this proceeding. Consequently, for the purposes of this hearing, the respondent provided substantial assistance to the Government.

The respondent ultimately received a sentence of 7 months in prison, 3 months of supervised release, and 8 months of community control sanctions. (GRX2, T-l). The respondent served her sentence. However, Judge Ellis later vacated the community control portion because the respondent was taken into DHS custody and therefore could not fulfill this requirement.

The respondent was also fined $2,500 and a special assessment of $200, was required to pay $ 88,885 in back taxes and penalties, and forfeited $ 505,251. (GRX2, T-1,3). The respondent's husband was convicted of a tax misdemeanor and sentenced to one year in prison. He has not yet served his sentence because his surrender was stayed pending the respondent's release from Federal custody so that their three children would have a parental care-giver.

15. 2005 E-Mails

The DHS raises two unsolicited e-mails sent by PRC customers to the respondent's e-mail account in the Spring of 2005, while she was in DHS custody. (GRX13, T-58, 59). Those e-mails were promptly turned over to the U.S. Attorney by Mr. Yamamoto, the defense attorney for the respondent's husband. These e-mails have nothing to do with the respondent and are irrelevant to this case.

16. Trade and Contracting Bars Against the Respondent

As a result of her criminal convictions, the respondent has been barred from engaging in international trade for a period of 10 years. (GRX17, T-39). She also has been debarred from government contracting.

17. Respondent's Loss of "Face"

Once she pleaded guilty to the criminal charges, thereby publicly exposing her unseemly conduct, the respondent lost "face" within the scholarly and political communities. Her once sterling reputation was badly tarnished. Overnight, she went from international heroine to disgraced convict. Understandably, those who had taken up her cause during her detention in the PRC and who had celebrated and honored her courage upon return felt betrayed by her deceptive dealings with the PRC and abandoned their support for her.

18. Effect on Respondent's U.S. Citizen Children

Because the respondent's husband also had become involved in her criminal scheme, and had pleaded guilty to a tax misdemeanor, the respondent's three young U.S. citizen children faced the prospect of going through a formative period of life without any parental presence in the home. Although innocent of any wrongdoing, they also faced "disgrace by association" because of their parents' well-publicized criminal conduct, all brought on by the respondent's greed-based scheming.

19. Effect of Separation From Children

I find that the respondent is genuinely distraught and in pain because of her separation from her U.S. citizen children. This is particularly true with respect to her two-year-old and three-year-old sons. At this point, she is highly motivated to avoid any future misconduct that would result in her incarceration or removal. I also find that the respondent is an intelligent person who is fully capable of making an honest living.

B. Credibility

1. DHS Witnesses

I find all of the DHS witnesses credible. Each witness was thoroughly professional and presented me with his or her sincere observations and opinions about this case to the best of his or her ability. By finding Mr. Danis and Special Agents Marrion and Guerrant credible, however, I do not adopt their negative view of the respondent's cooperation or her future conduct.

2. Mr. Yamamoto

Mr. Yamamoto is a credible witness.

3. Respondent

I find the respondent partially credible. Her testimony regarding her intent to close down her trading business immediately following her return from the PRC varies from the facts in the record. The respondent may have convinced herself that she intended to abandon her unlawful trade when she

returned from the PRC. But, her actions on this record show otherwise.

I find credible her testimony regarding her post February 2002 cooperation with the Government, her post-conviction desire to conduct herself in a manner that would avoid further violations of law and further incarceration, the trauma caused by her separation from her children, and her ability and intentions to earn an honest living in the future.

VI. ANALYSIS AND CONCLUSIONS OF LAW

As of February 25, 2002, the respondent was willing and able to engage in unlawful exports to the PRC. Without effective intervention by our law enforcement authorities, the respondent likely would have indefinitely continued her highly inappropriate behavior. I am disappointed that the respondent fails fully to acknowledge this. However, this particular shortcoming of the respondent does not affect my ultimate conclusion.

Being caught is the key event affecting the respondent's future conduct. For some criminals, getting caught and doing time is just a cost of doing business. But that is not true for this respondent.

The respondent is a first-time offender who once moved within highly respected scholarly circles. Conviction and incarceration as a criminal have turned her life upside down.

Perhaps, the respondent's Chinese espionage conviction actually enhanced her reputation as a dissident within the scholarly world. But, two greed-based U.S. felony convictions do no such thing. As a

consequence of her criminal conduct and resulting incarceration, the respondent has lost her good reputation within the scholarly community. She now finds herself shunned by those who once praised and admired her.

More importantly, the respondent's predicament threatens the well being of her three young U.S. citizen children. As a result of her misconduct, they are growing up without her. This obviously causes the respondent immense pain and anguish. Future unlawful conduct would have catastrophic consequences for the respondent and her family.

On this record, I have no reason to believe that the respondent is either a "spy" or an agent of the PRC government. I find that her greed blinded her to the reasonably foreseeable adverse consequences, to this country, herself, and her family, of her unlawful trade with the PRC. But, this does not lead me to believe that she will offend in the future.

Clearly, the respondent has made serious mistakes in her life and has paid a price. At times, she has acted unwisely and unethically. But, she by no means is an inherently evil person. She also has done good things, as evidenced by some of her scholarly work.

The respondent has rendered substantial assistance to Federal law enforcement authorities as found by Judge Ellis upon the recommendation of United States Attorney McNulty. I have reason to believe that the respondent is motivated by her own self interest and the welfare of her family to redeem herself, lead an honest, productive life, and avoid

future unlawful activity. She certainly has the intelligence and ability to do this.

I believe that the respondent has learned her lesson. 1 find that she now seeks to enter the United States exclusively to care for her family and to support herself and her family through honest work and not for any unlawful purpose, including further trade with the PRC.

I find support for my view in the actions taken by Judge Ellis with respect to the respondent's release on bond and her criminal sentence and United States Attorney McNulty with respect to the downward departure and his recommendation that the respondent not be deported. Judge Ellis, United States Attorney McNulty, and I play distinct, yet related, roles in the respondent's journey through the Federal justice system. I interpret the actions of Judge Ellis and United States Attorney McNulty as indicating that neither of them has substantial reason to believe that the respondent will engage in recidivist criminal conduct. I find it significant that we all have reached the same basic conclusion about the respondent's likely future conduct after examining the same basic facts about her past conduct, albeit from different angles.

Accordingly, I conclude that the respondent has rebutted the presumption of future export control violations arising from her past conduct. I conclude that at present there is not a reasonable possibility that the respondent will resume her unlawful trade activities. In other words, I conclude that in present circumstances, a reasonable person would not believe

that this respondent would engage in future unlawful trade activity.

I therefore conclude that the section 212(a)(3)(A)(i)(II) charge of inadmissibility is not sustained. As indicated earlier, I would reach this conclusion regardless of which party had the ultimate burden of proof.

VII. ELIGIBILITY FOR RELIEF

A. Relief Potentially Available to the Respondent

As a result of my rulings, I find the respondent eligible to apply for the following relief from removal: withholding of removal and deferral of removal under Article III of the CAT; withholding of removal under section 241(b)(3) of the Act; asylum; cancellation of removal under section 240A(a) of the Act; and waiver of inadmissibility under section 212(h) of the Act.

Because the standard for cancellation of removal is somewhat more generous than that for a section 212(h) waiver, I find it unnecessary to separately consider the latter. Were I to deny cancellation, I obviously would also have to deny the section 212(h) waiver. On the other hand, were I to grant cancellation, the section 212(h) waiver would be unnecessary.

B. Modification In Reasons For Ineligibility For Voluntary Departure

In my Preliminary Order, I found the respondent ineligible for voluntary departure because she is an arriving alien. Since then, the BIA, in an unpublished but widely circulated opinion, has held that arriving aliens may apply for voluntary departure.

Nevertheless, the respondent remains ineligible for voluntary departure because her convictions for crimes involving moral turpitude and her criminal incarceration for more than 180 days disqualify her from establishing the necessary good moral character during the preceding five years. I accordingly modify my reasons for pretermitting the respondent's voluntary departure application.

VIII. SUMMARY AND CONCLUSION

For the foregoing reasons, I do not sustain the section 212(a)(3)(A)(i)(II) charge against the respondent. I find her eligible to apply for relief and will consider her applications for relief under the CAT, asylum, withholding under section 241(b)(3) and cancellation of removal during the final "relief phase of these hearings commencing on February 13, 2006. The parties should plan to present the CAT, withholding, and asylum claims first, followed by the cancellation claim. I therefore enter the following orders.

ORDER

It is Ordered that: The charge of removability based on inadmissibility under section 212(a)(3)(A)(i)(II) of the Act is not sustained.

It is Further Ordered that: The respondent is eligible to apply for relief under Article 3 of the CAT, for asylum, for withholding of removal under section 241(b)(3) of the Act, for cancellation of removal under section 240A(a) of the Act, and for a waiver of inadmissible under section 212(h) of the Act.

It is Further Ordered that: The hearing on relief shall commence on February 13, 2006 in accordance with the notice previously given to the parties.

Paul Wickham Schmidt

US Immigration Judge

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW IMMIGRATION COURT
ARLINGTON, VIRGINIA

IN THE MATTER OF: GAO, ZHAN, RESPONDENT

FILE#: A70 519 150

IN REMOVAL PROCEEDINGS

Date: September 23, 2005

On Behalf Of Respondent:

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On Behalf Of DHS:

Maryellen Meymarian, Assistant Chief Counsel

Charges: Section 212(a)(3)(A)(i)(II), I&N Act, as amended – seeking to enter to violate or evade law prohibiting export from the United States of goods, technology, or sensitive information;

Section 212(a)(2)(A)(i)(I), I&N Act, as amended-convicted of crime involving moral turpitude.

APPLICATIONS: Cross motions to reconsider first preliminary order; request for rulings on legal issues

SECOND PRELIMINARY ORDER

I. INTRODUCTION

The parties cross-move for reconsideration of my August 11, 2005 preliminary order in which I found that the respondent is an arriving alien; that she is not inadmissible under section 212(a)(3)(A)(i)(II) as one coming to engage in violations of U.S. export control laws; and that both her export control and tax fraud convictions are crimes involving moral turpitude making her inadmissible under section 212(a)(2)(A)(i)(I). In that order, I also requested that the parties brief the question of whether the respondent has been convicted of an aggravated felony or a particularly serious crime. Additionally, I directed the respondent to file her applications for relief by September 1, 2005 and the DHS to file objections by September 15, 2005. Responding to a later joint request from the parties, I postponed the respondent's deadline for filing relief until September 30, 2005.

The parties agree with my finding that tax fraud is a crime involving moral turpitude. I also agree with the parties that the respondent's tax fraud conviction is not a particularly serious crime.

In my second preliminary order, I do the following: (1) grant the DHS motion to reconsider, vacate my ruling that the respondent is not inadmissible on the

section 212(a)(3)(A)(i)(II) charge, and inform the parties that I will schedule an evidentiary hearing on the respondent's activities following her last arrival in the United States on July 26, 2001; (2) deny the respondent's motion to reconsider my ruling that she is an arriving alien; (3) deny the respondent's motion to reconsider my finding that her export violation conviction is a crime involving moral turpitude; (4) agree with the respondent that her tax fraud conviction is not an aggravated felony under section 101(a)(43)(M)(i) of the Act; (5) find that the respondent's export control violation is not a particularly serious crime; (6) deny the DHS request for an evidentiary hearing on the particularly serious crime issue; (7) direct the parties to file proposed witness lists prior to the scheduled October 5, 2005 master calendar hearing at which we will set a date for the hearing on the respondent's admissibility; and (8) postpone the respondent's filing date for applications for relief until I hear the evidence and decide the remaining question of admissibility under section 212(a)(3)(A)(i)(II) (which also affects eligibility for relief).

In connection with this order, I have placed in the record and considered all evidence and written arguments that the parties have submitted to date.

II. DHS MOTION TO RECONSIDER

In connection with the motion to reconsider, DHS submits 52 items of documentation (Group Exhibit (hereafter "GRX") 8). Several of these documents challenge assertions made by the respondent in her unsworn affidavit attached to her June 29, 2005 pre-

hearing brief (GRX 5, T-4). The DHS also submits two e-mails (GRX 8, T-57, 58) in support of the theory that the respondent and or her husband continue to have an interest in doing business exporting technology items from the United States to the People's Republic of China ("PRC").

The respondent previously has claimed that her activities after she returned to the United States from the PRC in 2001 related solely to closing down her business. Through counsel, she disputes the significance of the DHS submissions. I am aware that at the time of the above-referenced e-mails, the respondent was in DHS detention.

I do not intend to retry the respondent's criminal case. However, the incidents incorporated in the record of conviction in that case end in January 2001, prior to the respondent's most recent return to the United States. *See* GRX 2, T-2. After reviewing the evidence now in the record, I find that there are sufficient factual disputes between the parties about the respondent's activities in the United States after she returned in July 2001, as they relate specifically to national security concerns, that a proper resolution requires an evidentiary hearing. I therefore will vacate my prior ruling that the respondent is not inadmissible under section 212(a)(3)(A)(i)(II) and take steps to schedule such a hearing.

In its motion to reconsider, the DHS also argues that the January 19, 2005 letter ("McNulty letter") from Paul J. McNulty, United States Attorney, Eastern District of Virginia, recommending against

the respondent's deportation is of little or no relevance to these proceedings. (GRX 5, T-5).

Mr. McNulty prosecuted the respondent for export and tax violations. In addition to being the chief federal prosecutor in his district, he is an expert in national security matters and well understands the important relationship between federal criminal prosecutions and immigration removal proceedings in the area of national security.

Mr. McNulty's non-binding recommendation that the respondent not be removed from the United States on the basis of his prosecution of her for export violations and related tax violations, his judgment that "she provided substantial assistance in the investigation of others who had committed crimes" (thus causing his office to move the U.S. District Court at sentencing for a downward departure under the sentencing guidelines), and his finding that her cooperation was "significant and of identifiable value to the government" is credible evidence supporting the respondent's contention that a reasonable person would not believe that she would pose any "nontrivial risk" to the national security under the standard established by the Attorney General in *Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005). I therefore will consider Mr. McNulty's views on the question of the respondent's potential danger to national security. But, I will reserve the question of exactly how much weight to give the McNulty letter until after 1 have heard all of the evidence on the section 212(a)(3)(A)(i)(II) issue.

I therefore direct that, prior to the next scheduled master calendar hearing on October 5, 2005, the parties submit to me proposed witness lists for the issue of the respondent's post-return activities as they relate to national security and estimates of the time necessary for examination and cross-examination so that we can establish a trial date.

III. RESPONDENT'S MOTION TO RECONSIDER

A. Arriving Alien

The respondent challenges my ruling that she is an arriving alien. First, she says she was "welcomed" to the United States by a representative of the U.S. State Department who took her passport and Form 1-551 "green card" and sent them to the INS in Washington and that she was not notified of the DHS's decision to parole her until perhaps a month later.

However, the DHS submits a contemporaneous government record (GRX 4, T-l 6) showing that on July 26, 2001 the respondent was paroled into the United States for a deferred inspection because of a documentary deficiency in her Form 1-551. The deferred inspection was authorized after consultation between local INS officials in Washington, D.C., and the Eastern Regional Office.

The form shows that the respondent was to report to the INS Washington District Office on or before August 27, 2001.

Although the respondent claims she did not receive notice of such reporting requirement, she admittedly did report to the INS Washington District Office before the specified date, on August 25, 2001. She admittedly

received an I-94 indicating a deferred inspection several days later.

As correctly pointed out by the DHS, the representative of the U.S. Department of State was not an immigration officer and had no authority to admit the respondent under the immigration laws. More importantly, the DHS supports its claim that the respondent was paroled with contemporaneous official records of that action. There is no evidence in the record that the respondent was thereafter "admitted" to the United States under the immigration laws.

Assuming that the DHS/INS did fail to promptly notify the respondent of her parole, that action does not invalidate the parole. The respondent need not have actual notice for the parole to be valid. Otherwise, we would have a system of admission by default, which would not protect the United States and could not be what Congress intended in providing that individuals arriving in the United States be screened for admissibility. In the context of this particular case, the respondent's subjective perception of her immigration status upon arrival is basically irrelevant.

While the respondent raises the specter of improper action on the part of the government, the respondent fails to show that the parole in this case is anything other than a legitimate decision by the DHS/INS to defer the final determination regarding her admissibility until a later date.

Next, the respondent argues that the DHS "forfeited" its claim that the respondent was paroled by returning and renewing the respondent's green card

after her arrival. But, as I pointed out in my earlier decision, the green card is merely evidence of the respondent's status as a lawful permanent resident, initially achieved in 1993, which continues up until the present. *See Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). Such status will only terminate if and when there is an administratively final determination of removability.

Consequently, while the DHS/INS could have chosen to issue the respondent some "temporary" evidence of her status pending a further determination, the return of her green card is not a decision admitting her to the United States. That return merely shows that the DHS was satisfying, in one available way, the requirement that the respondent be given evidence of her continuing status as a lawful permanent resident pending a final determination of her admissibility.

Contrary to the respondent's contention, a returning lawful permanent resident can be paroled, in the sole discretion of the DHS/INS, pending a determination of questions relating to admissibility. *See* section 212(d)(5) of the INA. I have authority to determine admissibility and to admit or remove aliens referred to me by the DHS through the issuance of a charging document. But, I have no authority to review the INS/DHS decision to parole an alien.

The respondent next claims the benefit of the so-called "*Fleuti* doctrine." However, as I pointed out in my prior order, the BIA has held that the *Fleuti* doctrine "does not survive the enactment of IIRIRA as

a judicial doctrine." *Matter of Collado*, 21 I&N Dec. 1061, 1065 (BIA 1998).

The respondent argues that section 101(a)(13)(C) of the Act does not permit her to be treated as seeking admission to the United States because she is a returning lawful permanent resident. The respondent correctly asserts that generally returning lawful permanent resident aliens cannot be treated as arriving aliens seeking admission. But, as I pointed out in my prior order, Congress created a number of exceptions to this general rule.

One exception to the general rule, set forth in section 101(a)(13)(C)(v), relates to an alien who has committed an offense identified in section 212(a)(2) of the Act. The DHS/INS acted appropriately and within its statutory authority by paroling the respondent, or, in other words, "deferring" her final inspection, pending a further investigation of her documents and completion of an investigation of allegations that she had committed crimes that would place her within section 212(a)(2). By her own admission, the respondent committed one such crime, tax fraud, a crime involving moral turpitude. I have found that she committed a second crime involving moral turpitude, export control violations.

Moreover, the respondent committed her crimes in 2000 and the period extending up to April 2001. While the respondent's convictions did not occur until 2004, she had at the time of her return to the United States in July 2001 clearly "committed offenses" that fit squarely within the statutory exception defined by Congress. *See Matter of Perez*, 22 I&N Dec. 689 (BIA

1999) (offense "committed" before the date of "conviction"). The only reason that the Government did not formally charge her with inadmissibility immediately upon her return was that she concealed her crimes from the Government (although by the time of her return the Government had the "leads" for the investigation that eventually would result in her and her husband's convictions). The respondent fits squarely within the statutory exception to the general rule and therefore may be treated as an arriving alien seeking admission to the United States.

Finally, the respondent claims that the DHS should not be allowed to question her admissibility under section 212(a)(2) of the Act because on April 13, 2001, Gerri L. Ratliff, Acting Director of Congressional Relations for the INS wrote to Senator Hatch, in response to his request for a bill report, that the respondent "meets the requirements for naturalization including good moral character."

I do not doubt that Ms. Ratliff is a prominent and authoritative person within her field of congressional relations. But, she had no official authority to adjudicate or determine any aspect of the respondent's immigration status nor was she charged with acting on her naturalization application. Moreover, Ms. Ratliff's letter was written before the respondent's return to the United States and before the full extent of her criminal misconduct leading to her convictions had been revealed. I find Ms. Ratliff s letter basically immaterial to the issue of the respondent's admissibility as an arriving alien.

For the foregoing reasons, I deny the respondent's motion to reconsider, and I reaffirm my finding that she is an arriving alien.

B. Export Control Violation As A Crime Involving Moral Turpitude

The respondent also challenges my prior finding that her conviction for violation of export control laws is a crime involving moral turpitude. I agree with the respondent that the statutory definition of the crime controls.

As noted in my prior opinion, the export control laws contain an element of willfulness. Thus, the possibility of "benign" violations that do not involve moral turpitude, has been largely, but not totally, eliminated. I recognized that there might be some instances where the statute could be violated without demonstrating the type of base, vile, depraved, or deceptive conduct normally associated with crimes involving moral turpitude.

The case most analogous to the respondent's situation is *Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999), relating to structuring currency transactions to evade reporting requirements. Congress had eliminated proof of knowledge of illegality as an element for conviction from that statute. This caused the BIA to find that the crime was not "inevitably nefarious." The Board found that the statute encompassed convictions for benign non-reporting which would not impair Government functions as well as convictions that involved the deliberate cover-up of illegal activity and impairing important Government functions. This is analogous to export control

violations which could cover relatively benign, somewhat technical, convictions as well as convictions involving deception that impairs an important Government function. In *Matter of L-V-C-*, supra, the Board consulted the record of conviction to determine whether the crime was one of moral turpitude.

As instructed by the Board in a case where the statute includes both crimes that may, and those that may not, involve moral turpitude, I consulted the record of conviction to see if it "demonstrates that the particular offense involved moral turpitude." *Id.* at 603.

The record of conviction establishes that from at least mid-2000 until at least January 2001, the respondent knowingly and willfully exported and caused to be exported from the United States to the PRC items which were designated, for national security reasons, on the Department of Commerce's Commerce Control List as without having first obtained from that Department a license or other written authorization for such export.

The record of conviction further shows that, using an alias or aliases to conceal her true identity, the respondent misrepresented to various sellers of these items that she was affiliated with United States universities, that the items purchased by her were being used for research, and that the items would not be exported from the United States.

The record also shows that the respondent received wire transfers from "China National" an entity known to have connections with the PRC military, and to be involved in the acquisition of

products and technology useful in the development of military and non-military applications. The respondent also entered into contracts with "the 14th Institute," an entity involved in the development of radar systems for the military of the PRC, as well as the development of civilian radar and air traffic control systems.

Among the items the respondent illegally exported to a subsidiary of China National were sophisticated military microprocessors, designed for aircraft, which can be employed in navigation, digital flight control and weapons fire control systems, radar data processing, and airborne battle management systems. These microprocessors can also perform target identification and discrimination functions in missiles, allowing the missile to hone in on and destroy its target. These microprocessors may also have non-military applications, including applications in commercial aviation.

The record further shows that the respondent concealed from the Government, payments to her and her husband from a subsidiary of China National.

When, during the plea colloquy that is part of the record of conviction (GRX 4, T-12 at 49-50), the U.S. District Judge asked the respondent what she did, the respondent said:

> At the time I was exporting goods to China, I knew the U.S. regulations had regulated this area. It was necessary to get a license before exporting certain items.
>
> I knew that it was possible that the Intel microprocessors I exported needed a license. But I

> avoided making any inquiries to find out. I did not want to find out about the license, because I knew almost all the applications for a license would be denied. I ultimately shipped the item without a license.

Here, unlike *L-V-C-, supra*, the record of conviction shows that the respondent's course of deception and knowing, willful violations, for monetary gain, of export control regulations intended to protect the national security impaired an important Government function and is, therefore, base, inherently dishonest conduct mat involves moral turpitude.

For the foregoing reasons, I deny the respondent's motion to reconsider and reaffirm my finding that her conviction for export control violations was a crime involving moral turpitude.

IV. TAX FRAUD AS AN AGGRAVATED FELONY

The parties agree that there is no BIA or Fourth Circuit precedent directly addressing the question of whether tax fraud conviction under section 7206 of the Internal Revenue Code is an aggravated felony under section 101(a)(43)(M)(i) of the Act. The latter section relates to an offense involving fraud or deceit where the loss to the victim or victims exceeds $10,000. The parties also agree that the respondent's tax conviction is not covered by section 101(a)(43)(M)(ii) if the Act which relates specifically to violations of section 7201 of the Internal Revenue Code.

The parties point me to divergent lines of authority from other circuits. The Ninth Circuit finds that a section 7206 violation is covered by (M)(i) because it involves fraud, and therefore fits within the

"plain meaning" of that section. *Abreu-Reyes v. INS*, 292 F.3d 1029 (9th Cir. 2002), *withdrawn on other grounds*, 350 F.3d 966 (9th Cir. 2003).

On the other hand, the Third Circuit holds that section (M)(ii) is the exclusive expression by Congress of what tax crimes are aggravated felonies, and that only tax evasion under section 7201 of the Internal Revenue Code was intended by Congress to be an aggravated felony. Finding that including tax fraud under section 7206 under the general fraud provision of (M)(i) would make section (M)(ii) superfluous, the Third Circuit concluded that a section 7206 violation was not an aggravated felony. *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004). The Third Circuit was aware of, but did not adopt, the Ninth Circuit's contrary analysis in *Abreu-Reyes*, *supra*. There were dissents in both *Lee* and *Abreu-Reyes*.

After considering the parties' arguments, and in the absence of any binding precedent in this circuit, I adopt the *Lee* approach and find that the respondent's violation of section 7206 is not an aggravated felony. I disagree with the DHS argument that this issue was resolved by the Supreme Court in *INS v. St. Cyr*, 533 U.S. 289 (2001). The holding in *St. Cyr* dealt entirely with another issue.

While predicting circuit court outcomes in aggravated felony cases is at best a high-risk enterprise, I find the Third Circuit's approach in *Lee* very consistent with the Fourth Circuit's recent approach to statutory interpretation in *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005). In that case, the Fourth Circuit found it essential to interpret the

aggravated felony provision in a way that would not make section (M)(i) superfluous by having it swallowed by broadly defining "theft offenses" in another section. This is very similar to the concern expressed by the Third Circuit in *Lee* that a reading of (M)(i) to include Internal Revenue crimes involving fraud would make superfluous the specific provision of (M)(ii) relating to an IRS crime involving fraud.

For the foregoing reasons, I adopt the Third Circuit's approach in *Lee* and find that the respondent's conviction for tax fraud is not an aggravated felony.

V. PARTICULARLY SERIOUS CRIME

In determining whether a conviction is a "particularly serious crime" under the immigration laws, I must examine the nefarious or harmful character of the crime. *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002). In particular, the Attorney General found that an alien's decision to provide critical information to law enforcement officials has no bearing on whether her crime is characterized as a "particularly serious crime." *Id.*

Similarly, the Attorney General found that while "the imposition of certain harsh sentences may obviate the need to probe the underlying circumstances of a particular crime... commonplace circumstances as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence" shed little or no light on the character of the crime. *Id.* at 274, 277.

Therefore, the respondent's relatively light sentence, her post-arrest cooperation with the Government, her lack of a prior United States criminal record, and any acceptance of responsibility the sentencing U.S. District Judge may have credited to her, do not help the respondent on the "particularly serious crime" issue.

The DHS requests an evidentiary hearing on this issue. But, I have a very extensive record of conviction containing a detailed stipulation of facts, a plea colloquy among the parties and the U.S. District Judge, and a detailed sentencing report, as well as other documentation provided by both parties which illuminates the respondent's particular crime. The current record is more than adequate for me to determine the character of the respondent's crime. The parties have also made full and very articulate written arguments on this issue. I therefore will deny the DHS request for an evidentiary hearing on this issue.

The respondent characterizes her export violation crime as merely a "regulatory violation." She argues that there were no "victims," and that the microprocessors that she illegally exported to organizations associated with the PRC military had benign civilian, as well as military, uses. She points out that no force was used in her violation and likens it to credit card fraud, which at least one court has found not to be a particularly serious crime.

However, I agree with the DHS that the respondent's crime is not truly "victimless." It is only victimless in that the potential harm caused by the respondent's actions cannot be precisely determined.

The controlled technology illegally exported by the respondent could well be used for military purposes, particularly because it was shipped to organizations known to be connected with the PRC military. The respondent certainly cannot show that it will not be so used. In theory, as DHS points out, we all could be victims of the respondent's criminal actions. Moreover, the respondent attempts to minimize the important national security interests that the export control regulations were designed to protect.

On the other hand, I do not agree with DHS's attempt to characterize the respondent's export control violations as the equivalent of the drug trafficking crimes that the Attorney General found the be a presumptively particularly serious crimes in *Matter of Y-L-, supra*. There are no "benign" outcomes of drug trafficking and, as pointed out by the Attorney General, drug trafficking often leads directly to other types of violent crime and to specific, known health and safety risks.

I find that the respondent's export control violation is more serious than most "regulatory crimes" or credit card fraud, but is not as serious as drug trafficking. It falls somewhere in between.

The respondent's crime did not involve violence directed against individuals. It does not have a direct link to violent crime as does drug trafficking, nor does it directly affect the health of individuals in the United States in the way that drug trafficking does. While admittedly serious, morally reprehensible, and creating potential future risks, the respondent's export control crime is closer to the types of non-violent

"white collar" crime that generally have been found not to be particularly serious than it is to the types of violent or potentially violent crimes against individuals or drug trafficking which generally have been found to be particularly serious.

For the foregoing reasons, I conclude that the character of the respondent's criminal offense of violating export control laws does not make it a "particularly serious crime."

VI. CONCLUSION

For the foregoing reasons, I grant the DHS motion to reconsider, vacate my prior finding that the respondent is not removable under section 212(a)(3)(A)(i)(II), and direct the parties to prepare for a hearing on the respondent's conduct following her July 2001 return to the United States as it relates to national security concerns. I deny the respondent's motion to reconsider, thereby reaffirming my prior findings that she is an arriving alien and that her export control crime is a crime involving moral turpitude.

I find that the respondent is not an aggravated felon and that she has not committed a particularly serious crime. I deny the DHS request for an evidentiary hearing on the particularly serious crime issue. I defer the respondent's filing of applications for relief.

I will therefore issue the following findings and orders.

FINDINGS:

1. The respondent is an arriving alien.

2. The respondent's conviction for export control violations is a crime involving moral turpitude making her inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

3. The respondent is not an aggravated felon.

4. The respondent has not committed a particularly serious crime.

ORDERS:

1. The respondent's motion for reconsideration is denied.

2. The DHS motion for reconsideration is granted, and my order of August 11, 2005 finding the respondent not removable under section 212(a)(3)(A)(i)(II) is vacated.

3. The parties shall submit witness lists and time estimates in accordance with this order prior to the scheduled October 5, 2005 Master Calendar hearing.

4. The respondent's deadline for filing applications for relief and supporting documentation is deferred pending further hearing.

5. The DHS request for an evidentiary hearing on the particularly serious crime issue is denied.

Paul Wickham Schmidt

United States Immigration Judge

APPENDIX H

Article 33 of the 1968 United Nations Protocol Relating to the Status of Refugees, to which the United States has acceded, provides:

Prohibition of Expulsion or Return ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

No. 10-130

In the Supreme Court of the United States

ZHAN GAO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals (Board) reasonably concluded that an offense need not be an aggravated felony to qualify as a "particularly serious crime" that bars eligibility for withholding of removal under 8 U.S.C. 1231(b)(3)(B).

2. Whether an offense must be an aggravated felony or a crime designated by regulation as particularly serious to qualify as a "particularly serious crime" that bars eligibility for asylum under 8 U.S.C. 1158(b)(2)(A)(ii).

3. Whether the Board reasonably concluded that, once it has determined that a crime is a "particularly serious" one, no separate determination that an alien is a danger to the community is necessary.

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8 U.S.C. 1158(b)(2)(A)(ii) 2, 19, 22
8 U.S.C. 1158(b)(2)(B)(i) 2, 19
8 U.S.C. 1158(b)(2)(B)(ii) 2, 11, 20
8 U.S.C. 1182(a)(2)(A)(i)(I) 6
8 U.S.C. 1182(a)(3)(A)(i)(II) 6, 9
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8 U.S.C. 1231(b)(3)(A) 2, 3
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8 U.S.C. 1253(h)(2)(B) (1980) 15
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Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (3d ed. 2007) 16

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United Nations High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992) 16

In the Supreme Court of the United States

No. 10-130

ZHAN GAO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 595 F.3d 549. The opinions of the Board of Immigration Appeals (Pet. App. 19a-46a) and of the immigration judge (Pet. App. 47a-151a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2010. A petition for rehearing was denied on April 23, 2010 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in

their discretion, grant asylum to an alien who demonstrates that she is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An alien applying for asylum generally must file her application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating that she is eligible for asylum. 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1) and (2).

An alien is not eligible for asylum, however, "if the Attorney General determines" that "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. 1158(b)(2)(A)(ii). For purposes of asylum, the INA provides that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime," 8 U.S.C. 1158(b)(2)(B)(i), and that "[t]he Attorney General may designate by regulation offenses that will be considered to be a [particularly serious] crime," 8 U.S.C. 1158(b)(2)(B)(ii).

b. An alien also may be eligible for withholding of removal under the INA. See 8 U.S.C. 1231(b)(3)(A); 8 C.F.R. 1208.13(c)(1), 1208.16(a). Withholding of removal is available if the alien demonstrates that her "life or freedom would be threatened" in the country of re-

moval "because of [her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

As with asylum, an alien is ineligible for withholding of removal "if the Attorney General decides" that "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. 1231(b)(3)(B). For purposes of withholding of removal,

> an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

Ibid.

c. An alien who is ineligible for asylum and withholding of removal may obtain deferral of removal under regulations implementing United States obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85. To obtain this protection, an applicant must demonstrate, *inter alia*, that it is more likely than not that she would be subject to severe pain or suffering intentionally inflicted

"by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" if removed to a certain country. 8 C.F.R. 1208.18(a)(1); see 8 C.F.R. 1208.16(c)(2).

2. Petitioner is a native and citizen of China. Pet. App. 4a. She came to the United States on a student visa in 1989 and became a lawful permanent resident in 1993. *Id.* at 4a, 112a.

From at least mid-2000 through February 2002, petitioner exported computer components to China in violation of federal law. Pet. App. 4a, 23a, 112a, 143a; Administrative Record (A.R.) 6086-6089. Those components included "sophisticated military microprocessors" designed for use in aircraft navigation, flight control, weapons control, radar, and airborne battle management systems. Pet. App. 144a; see A.R. 6089-6090. The components "can also perform target identification and discrimination functions in missiles, allowing the missile to hone in on and destroy its target." Pet. App. 144a. The components are restricted from export for national security reasons. *Id.* at 113a, 143a; A.R. 6089.

Petitioner used aliases to conceal her true identity when acquiring and exporting the components and falsely told the sellers of the components that she was affiliated with American universities and was purchasing the items for research in the United States. Pet. App. 113a, 143a; A.R. 6089. Petitioner then sold the components to entities that were connected to the Chinese military and were actively acquiring products and technology to develop military applications. Pet. App. 113a, 115a-116a, 118a-119a, 143a-144a; A.R. 6087.

In early 2001, petitioner traveled to China to visit family. Pet. App. 4a. Petitioner carried with her two computer components, which she provided to her Chi-

nese customers in violation of United States export laws. *Id.* at 117a. While in China, petitioner was detained by the Chinese government and tried for taking "internal" documents out of China and for assisting the government of Taiwan. *Id.* at 4a. She was convicted and sentenced to ten years of imprisonment, but was released on medical parole two days after her conviction. *Id.* at 4a, 63a. While petitioner was detained in China, her husband attempted to continue carrying on her illegal export business. *Id.* at 5a, 118a.

Petitioner then returned to the United States and resumed exporting restricted technology to China. Pet. App. 4a, 23a, 118a-119a. Petitioner made seven new shipments of components between November 2001 and January 2002. *Id.* at 5a, 23a. Petitioner also developed new aliases and "devised new 'ruses' to mislead customers as to her future intentions." *Id.* at 4a, 118a-119a. Petitioner continued her illegal activity even though she knew that the United States government had been responsible for securing her release after her trial in China. *Id.* at 119a; see *id.* at 33a. Petitioner did not stop exporting controlled items to China until the United States government became aware of her activities and executed a search warrant at her home in February 2002. *Id.* at 118a-119a.[1]

Petitioner received over $500,000 in proceeds from the illegal exports. Pet. App. 4a; A.R. 6091. She attempted to hide those proceeds by transferring them between different bank accounts, Pet. App. 115a, 144a; A.R. 6091,

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[1] Petitioner continued some of her illegal activities even after that point; as the Board noted, she "contacted manufacturers and placed orders using a fictitious name and cover story in April or May 2003, only months before her November 2003 plea agreement." Pet. App. 24a (internal quotation marks omitted).

and she and her husband knowingly filed false tax returns that omitted these proceeds, Pet. App. 4a; A.R. 6091-6092.

3. In November 2003, petitioner pleaded guilty to two felonies: unlawful export of commerce-control-list items and tax fraud. Pet. App. 5a; see 26 U.S.C. 7206(1) (tax fraud); 50 U.S.C. 1702, 1705(b) (unlawful export); 15 C.F.R. 736.2, 764.2, 764.3(b) and 774.1 (unlawful export); Exec. Order No. 12,924, 3 C.F.R. 917 (1994) (unlawful export); see also A.R. 6079-6085 (judgment).[2]

Based on those convictions, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner. A.R. 6217-6220. Petitioner was charged with being inadmissible on two grounds: as an alien who entered the United States to engage solely, principally, or incidentally in activity to violate or evade prohibitions on exporting goods, technology, or sensitive information from the United States; and as an alien who was convicted of a crime involving moral turpitude. Pet. App. 5a-6a; A.R. 6217-6219; see 8 U.S.C. 1182(a)(3)(A)(i)(II) (entering U.S. to engage in prohibited export activity); 8 U.S.C. 1182(a)(2)(A)(i)(I) (crime of moral turpitude).

After several hearings, an immigration judge (IJ) determined that petitioner was not removable on the first ground but was removable on the second ground, because her convictions for tax fraud and unlawful export were crimes involving moral turpitude. Pet. App. 49a, 102a. In particular, the IJ found that petitioner's

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[2] Although she entered a guilty plea with the assistance of counsel, petitioner later filed a petition under 28 U.S.C. 2255, seeking to attack her conviction and sentence on numerous grounds. The district court denied the petition. See *Gao* v. *United States*, 375 F. Supp. 2d 456 (E.D. Va. 2005).

conviction records demonstrated a "course of deception and knowing, willful violations, for monetary gain, of export control regulations intended to protect the national security [of the United States]." *Id.* at 145a; see *id.* at 113a (petitioner "routinely employed a number of dishonest and unethical practices in her business"). Petitioner does not dispute that she is removable on these grounds. *Id.* at 7a, 18a, 35a, 140a.

The IJ then granted petitioner asylum, withholding of removal, and deferral of removal under the CAT. Pet. App. 91a-98a, 102a. The IJ determined that petitioner's detention in China in 2001 constituted past persecution on account of her political opinion, and that petitioner likely would be persecuted and tortured if returned to China because she has spoken out against the Chinese government. *Id.* at 91a-98a.

The IJ rejected DHS's argument that petitioner was ineligible for asylum and withholding because her conviction for unlawful export qualified as a "particularly serious crime." Pet. App. 147a-150a. The IJ acknowledged that petitioner's crime was "serious, morally reprehensible, and creat[ed] potential future risks" to the United States, but was of the view that the crime was not particularly serious because it did not involve "a direct link to violent crime" or "directly affect the health of individuals in the United States." *Id.* at 149a.

The IJ then denied petitioner's requests for various discretionary waivers that would allow her to retain her lawful permanent resident status, finding that petitioner "abused" the privilege of lawful permanent residency and "caused substantial problems * * * for a number

of critically important U.S. Government agencies." Pet. App. 101a.[3]

4. a. The Board of Immigration Appeals (Board) reversed. Pet. App. 30a-46a. As relevant here, the Board held that petitioner is ineligible for asylum and withholding of removal because her conviction for unlawfully exporting controlled items qualifies as a "particularly serious crime." *Id.* at 38a-43a. The Board explained that while an unlawful export conviction does not always qualify as a particularly serious crime, "in this case * * * the national security implications of [petitioner's] offense render it a particularly serious crime." *Id.* at 40a. The Board explained that, under its established precedent, whether a crime qualifies as particularly serious is determined on a case-by-case basis, and it rejected the view that a crime must be an "aggravated felony" to qualify as "particularly serious." *Id.* at 40a-41a.

The Board found that petitioner had "acted with blatant disregard for the laws of this country and placed her desire for financial gain ahead of the security interests of the United States." Pet. App. 42a. The Board explained that petitioner had exported "sophisticated microprocessors with well-known military applications," using "several aliases and obtain[ing] the devices at deep discounts by falsely claiming to be affiliated with various universities and telling distributors that the items would be used for academic purposes," and then "s[elling] the microprocessors at substantial mark-ups to quasi-governmental entities." *Id.* at 41a-42a. The Board also noted that, after her incarceration and conviction in

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[3] Petitioner did not appeal the denial of this discretionary relief, Pet. App. 31a n.1, and it is therefore not at issue here.

China, petitioner returned to the United States and promptly "resumed her business dealings and even adopted new aliases." *Id.* at 42a. The Board determined that petitioner created a substantial risk to national security, and found it "impossible to quantify the number of lives [she] potentially imperiled by exporting military technology that is still presumably extant." *Ibid.*

Although the Board held that petitioner is ineligible for asylum and withholding of removal, it upheld the IJ's grant of deferral of removal under the CAT. Pet. App. 7a, 46a.

b. On cross-motions for reconsideration, the Board reaffirmed that petitioner's offense qualifies as a particularly serious crime. Pet. App. 25a-28a. The Board rejected petitioner's argument that an offense must be an aggravated felony to qualify as a particularly serious crime that bars withholding of removal, explaining that the statutory text places no such limit on the Attorney General's discretion. *Id.* at 25a-26a. Again relying on the Board's longstanding "practice * * * of making particularly serious crime determinations on a case-by-case basis," the Board reiterated that petitioner's "unlawful export activity with China presented a risk to national security that elevated her offense to a particularly serious crime." *Id.* at 26a-27a.[4]

5. The court of appeals denied the petition for review. Pet. App. 2a-18a. The court first held that a crime

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[4] The Board also reversed the IJ's ruling that petitioner is not inadmissible under 8 U.S.C. 1182(a)(3)(A)(i)(II), as an alien who entered the United States to engage in unlawful exportation. Pet App. 21a-24a. Petitioner challenged that holding on appeal, but the court of appeals did not address it because petitioner conceded that she was removable on another ground. *Id.* at 18a. Petitioner does not renew the argument before this Court.

need not be an aggravated felony to qualify as a particularly serious crime for purposes of withholding of removal. *Id.* at 8a-12a. Applying the familiar framework set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984), the court determined that the statute does not unambiguously provide that an offense must be an aggravated felony to be a particularly serious crime and that the Board's reading of the statute is reasonable. Pet. App. 9a-12a. The court explained that the statute provides that the Attorney General may "decide" that an alien's offense is a particularly serious crime, 8 U.S.C. 1231(b)(3)(B), and nothing in the statute limits that broad discretionary authority to find crimes particularly serious. Pet. App. 8a-9a.

The court of appeals explained that the Board's construction of the statute—set out in the Board's recent precedential decision in *In re N-A-M-*, 24 I. & N. Dec. 336 (B.I.A. 2007), aff'd, 587 F.3d 1052 (10th Cir. 2009), petition for cert. pending, No. 10-5651 (filed July 29, 2010)—is plainly reasonable. Pet. App. 10a-12a. The court explained that the statute's text "does not declare that some categories of crimes may not be considered particularly serious"; rather, it "creates a per se rule that some aggravated felonies must be considered particularly serious and then leaves it up to the Attorney General to 'decide[]' whether other crimes are as well." *Id.* at 10a-11a (quoting 8 U.S.C. 1231(b)(3)(B)). The court determined that the Board's interpretation is consistent with the statute's history and background and that it furthers the statute's purpose, which is "to protect the public from dangerous individuals," even if their crimes do not qualify as aggravated felonies under the INA. *Id.* at 11a-12a.

The court then turned to asylum, and rejected petitioner's argument that an offense can qualify as a particularly serious crime for asylum purposes only if it is an aggravated felony or the Attorney General has designated it as a particularly serious crime by regulation. Pet. App. 12a-15a. The court observed that the asylum provision, like the withholding provision, grants the Attorney General broad authority to "determine[] that" a crime is particularly serious; that petitioner conceded that a crime need not be an aggravated felony to qualify as "particularly serious" for asylum purposes; and that "nothing in the statute says that the Attorney General must use regulation[s] to designate crimes as particularly serious." *Id.* at 13a-14a. The court noted that the statute's language—stating that the Attorney General "*may* designate by regulation" certain offenses as particularly serious, 8 U.S.C. 1158(b)(2)(B)(ii) (emphasis added)—is "permissive" and "does not preclude [the Attorney General] * * * from determining whether an individual alien's crime [is] particularly serious by looking at the underlying facts in the course of adjudication." Pet. App. 14a. The court also observed that it is a "basic principle of administrative law" that an agency may choose to proceed through rulemaking or adjudication, and that requiring a categorical approach would be "insensitive to individual circumstances" and create "immense practical difficulties." *Id.* at 14a-15a.

In a footnote, the court rejected petitioner's argument that, in addition to determining that a crime is a particularly serious one, the Board also must independently find that the alien is a danger to the community. Pet. App. 12a n.1. The court cited its prior holding that "once the particularly serious crime determination is made, the alien is ineligible for withholding without a

separate finding on dangerousness." *Ibid.* (quoting *Kofa* v. *INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (en banc)).[5]

6. Petitioner filed a petition for rehearing, which was denied, with no judge calling for a vote on the petition. Pet. App. 1a.

ARGUMENT

1. Petitioner first contends (Pet. 16-23) that an offense must be an aggravated felony to qualify as a particularly serious crime for purposes of withholding of removal. The court of appeals correctly rejected that argument. Although there was disagreement in the circuits on this issue prior to the Board's precedential decision in *In re N-A-M-*, 24 I. & N. Dec. 336 (B.I.A. 2007), aff'd, 587 F.3d 1052 (10th Cir. 2009), petition for cert. pending, No. 10-5651 (filed July 29, 2010), there is not now disagreement in the circuits about whether the Board's authoritative interpretation is entitled to deference. Accordingly, review of the question presented is not warranted at this time.

a. The court of appeals correctly deferred to the Board's interpretation of the withholding-of-removal provision under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). That provision states that an alien is ineligible for withholding of removal "if the Attorney General decides" that "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. 1231(b)(3)(B). It then prescribes a per se rule that "an alien who has been convicted of an aggravated felony (or

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[5] The court also held that the Board did not abuse its discretion in finding that petitioner's crime was particularly serious based on its facts. Pet. App. 16a-17a. Petitioner does not challenge that holding before this Court.

felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime." *Ibid.* Finally, the statute provides that the per se rule "shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." *Ibid.*

The court of appeals correctly applied the familiar *Chevron* framework and concluded that the Board's interpretation of the statute was reasonable. Section 1231(b)(3)(B) does not set forth a restrictive rule that only aggravated felonies may qualify as particularly serious crimes. Instead, it grants the Attorney General the discretionary authority to decide if a crime is particularly serious, with the only limitation being that some aggravated felonies *are* per se "particularly serious." Pet. App. 9a-10a. As the court of appeals explained, "[t]he statute does not declare that some categories of crimes may not be considered particularly serious"; instead, "it creates a per se rule" and "then leaves it up to the Attorney General to 'decide[]' whether other crimes are [particularly serious] as well." *Id.* at 10a-11a.

Because the statutory text does not prohibit the Attorney General from determining that a non-aggravated felony is a "particularly serious crime," the Board's interpretation of the statute is entitled to deference so long as it is reasonable. *E.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ; see 8 C.F.R. 1003.1(d)(1). The Board has long held that whether a crime is "particularly serious" depends upon "consideration of the individual facts and circumstances" of each case, *In re L-S-*, 22 I. & N. Dec. 645, 651 (B.I.A. 1999), such as the "nature of the conviction, the circumstances and underlying facts of

the conviction, the type of sentence imposed, and * * * whether the type and circumstances of the crime indicate that the alien will be a danger to the community," *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982). In its recent decision in *N-A-M-*, the Board explained why, in light of the statute's text, history, and purposes, particularly serious crimes are not limited to aggravated felonies. 24 I. & N. Dec. at 338-341. The Board noted that the text includes no such limitation; that the statutory history shows that Congress intended "to allow a more flexible analysis in determining whether an offense is a particularly serious crime"; and that limiting particularly serious crimes to aggravated felonies "would be inconsistent with the goal of protecting the public." *Id.* at 340-341.[6]

The Board's interpretation of the statute is plainly reasonable. The statute by its terms gives the Attorney General the discretion to decide which claims qualify, with the only limitation being that some aggravated felonies necessarily constitute particularly serious crimes. 8 U.S.C. 1231(b)(3)(B). Moreover, the statute's legislative history confirms that, beyond the per se rule for aggravated felonies for which an alien received at least a five-year sentence, Congress intended that the "Attorney General retain[] the authority to determine other circumstances in which an alien has been convicted of a particularly serious crime, regardless of the length of

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[6] Petitioner suggests (Pet. 22) that the Board's view in *N-A-M-* is not entitled to deference because it rested only on an analysis of the text of the INA. That is incorrect: although the Board did believe that the text plainly allows it to determine that an offense is a particularly serious crime even if the offense is not an aggravated felony, the Board also extensively analyzed the statute's history and purposes in coming to its ultimate conclusion. 24 I. & N. Dec. at 338-341.

sentence." H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 216 (1996).[7]

Further, as the court of appeals noted, the statute's history and purposes support the Board's interpretation. Pet. App. 11a-12a. Since the provision was enacted in 1980, the Board has consistently employed a case-by-case approach, in which "particularly serious crimes need not be aggravated felonies." *Id.* at 11a; see Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (enacting 8 U.S.C. 1253(h)(2)(B) (1980), the predecessor to 8 U.S.C. 1231(b)(3)(B)). Even though Congress "has amended the statute several times, it has never limited the concept of particularly serious crimes to aggravated felonies." Pet. App. 11a. In addition, the Board's view furthers the statute's purpose, which is "to protect the public from dangerous individuals." *Ibid.* As the Board has explained, some offenses "are potentially quite serious yet do not meet the technical requirements of being aggravated felonies"; limiting particularly serious crimes to aggravated felonies would "'create[] a gap or loophole' whereby individuals committing very serious crimes

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[7] The court of appeals properly rejected petitioner's argument that the last sentence of the provision (which states that nothing shall preclude the Attorney General from deciding that other crimes are particularly serious) limits the Attorney General's discretion by implication. As the court explained, "the language of that provision is not restrictive, but permissive," and it is naturally read "not as implicitly limiting the Attorney General's discretion to aggravated felonies but instead as reinforcing the scope of that discretion." Pet. App. 11a Petitioner's invocation of the *expressio unius* canon (Pet. 17) is inapposite here, because the canon does not apply when "statutory language suggesting exclusiveness is missing," *Chevron U S A. Inc* v. *Echazabal*, 536 U.S. 73, 80-81 (2002), such as when the statute "give[s] an agency * * * a good deal of discretion" in making a determination, *id.* at 80 The statute here affords the Attorney General such discretion.

would remain eligible for withholding of removal." *Id.* at 11a-12a (quoting *N-A-M-*, 24 I. & N. Dec. at 341 & n.6).[8]

[8] Petitioner is wrong to suggest (Pet. 18-21) that allowing non-aggravated felonies to qualify as particularly serious crimes would place the United States in violation of its treaty obligations. The Protocol Relating to the Status of Refugees (Protocol), *done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, is an international agreement designed to guarantee certain protections to refugees. It incorporates by reference most of the substantive portions of a previous international agreement —the 1951 Convention Relating to the Status of Refugees (Convention), July 28, 1951, 189 U.N.T.S. 150. See Protocol art. I(1) and (2), 19 U.S.T. at 6225, 606 U N.T.S. at 268.

The Convention and therefore the Protocol both preclude member nations from "expel[ling] or return[ing] * * * a refugee" to a country "where his life or freedom would be threatened" on account of a protected ground, Convention art. 33(1), 189 U.N.T.S. at 176. But "[t]he benefit of [that] provision may not * * * be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Convention art. 33(2), 189 U.N.T.S. at 176.

Congress has wide latitude in implementing its obligations under the Convention and Protocol. See, *e g*, Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 528 (3d ed. 2007) (the specific measures each contracting state takes to implement a treaty "are matters very much in the realm of sovereign discretion"). Congress's implementation of the treaty here is plainly reasonable. The Convention and Protocol do not define what types of crimes are sufficiently serious to qualify as particularly serious crimes, and they say nothing about aggravated felonies (a term developed not in the Convention or Protocol, but by Congress in the United States Code). Although petitioner cites (Pet. 19) a statement from a United Nations High Commissioner for Refugees Handbook that a crime must be a "very grave" offense to qualify, that statement does not refer to what constitutes a "particularly serious crime" for purposes of Article 33(2), nor does it say anything about whether the offense must be an aggravated felony. *Handbook on Procedures and Criteria for Determining Refugee Status* ¶¶ 155, 156 (1992). And, of course, the

Accordingly, the Board's interpretation of the withholding provision is "plainly permissible." *Id.* at 10a.

b. Contrary to petitioner's contention (Pet. 13-16), there is no disagreement in the circuits on this issue that warrants this Court's review. The Second, Fourth, Seventh, Ninth, and Tenth Circuits have held that an offense need not be an aggravated felony to qualify as a particularly serious crime under 8 U.S.C. 1231(b)(3)(B). See Pet. App. 9a-12a; *N-A-M-* v. *Holder*, 587 F.3d 1052, 1055-1056 (10th Cir. 2009), petition for cert. pending, No. 10-5651 (filed July 29, 2010); *Delgado* v. *Holder*, 563 F.3d 863, 867-869 (9th Cir. 2009), reh'g en banc granted, 621 F.3d 957 (9th Cir. 2010); *Nethagani* v. *Mukasey*, 532 F.3d 150, 156-157 (2d Cir. 2008); *Ali* v. *Achim*, 468 F.3d 462 (7th Cir. 2006), cert. granted, 551 U.S. 1188, cert. dismissed, 552 U.S. 1085 (2007).

It is true that the Third Circuit has held that an offense must be an aggravated felony to qualify as a "particularly serious crime" under Section 1231(b)(3)(B), *Alaka* v. *Attorney Gen. of the United States*, 456 F.3d 88, 104-105 (2006), and that this Court granted certiorari to address the issue in 2007. But there is not now a circuit conflict warranting this Court's review, for several reasons.

First, the Third Circuit decided *Alaka* in 2006 before the Board's authoritative construction of Section 1231(b)(3)(B) in *N-A-M-*. The Third Circuit therefore has not had the opportunity to consider whether that construction is entitled to *Chevron* deference. Petitioner cites (Pet. 15) two decisions in which the Third Circuit mentioned its holding in *Alaka*, but those decisions do

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Handbook "is not binding on the Attorney General, the [Board], or United States courts." *Aguirre-Aguirre*, 526 U.S. at 427.

not demonstrate that the Third Circuit would adhere to its prior holding after *N-A-M-*. The cases did not address whether an offense must be an aggravated felony to qualify as particularly serious (because the offenses in both cases were aggravated felonies) or consider whether the Board's analysis in *N-A-M-* is entitled to *Chevron* deference generally, and neither creates circuit precedent. See *Quiceno* v. *Attorney Gen. of the United States*, 304 Fed. Appx. 40, 43 (3d Cir. 2008) (unpublished); *Hussein* v. *Attorney Gen. of the United States*, 273 Fed. Appx. 147, 152 (3d Cir. 2008) (unpublished). The circuits that have considered the Board's construction of the statute in *N-A-M-* have all held that it is entitled to *Chevron* deference. See Pet. App. 9a-12a; *N-A-M-*, 587 F.3d at 1055-1056; *Delgado*, 563 F.3d at 867-869.

Second, and relatedly, the Third Circuit in *Alaka* did not consider the Board's interpretation or analyze the issue using the *Chevron* framework. Without even mentioning the Attorney General's broad discretion to "decide[]" that a crime is particularly serious, 8 U.S.C. 1231(b)(3)(B), the court resolved the case based on an "impli[cation]" from the statutory text, stating that "[t]he second sentence, authorizing the Attorney General to determine when a conviction is 'particularly serious,' is clearly tied to the first; it explicitly refers back to the 'previous sentence,' and accordingly *implies* that it is limited to aggravated felonies," 456 F.3d at 104-105 (emphasis added). That brief explanation constituted the Third Circuit's entire legal analysis. The fact that the Third Circuit did not even consider affording deference to the Board renders its legal conclusion plainly suspect. See *Aguirre-Aguirre*, 526 U.S. at 425 (finding that court of appeals erred "by failing to follow *Chevron* principles in its review of the [Board]"). When the Third Circuit

considers the Board's interpretation in *N-A-M-* using the *Chevron* framework, it would be free to determine—and may well determine—that the Board's interpretation is reasonable. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005). The Third Circuit should be permitted to conduct this analysis before this Court intervenes.

Third, review of the question presented would be premature at this time. Not only has the Third Circuit not had a chance to consider *N-A-M-*, but several other circuits have not considered it as well. Moreover, the Ninth Circuit recently granted en banc review of that issue (and another issue) in *Delgado*. The Court should wait for the decision in that case and allow further percolation in the other circuits before considering the first question presented.

2. Petitioner also contends (Pet. 23-26) that an offense qualifies as a particularly serious crime for asylum purposes only if the offense is an aggravated felony, or the Attorney General has designated the offense as a particularly serious crime by regulation. The court of appeals' decision is correct, and petitioner does not allege any disagreement in the circuits on this point.

a. The court of appeals correctly rejected petitioner's argument that non-aggravated felonies may qualify as particularly serious crimes barring asylum only if the Attorney General has designated them as such by regulation. The statute broadly empowers the Attorney General to "determine[]" that an alien has been convicted of a particularly serious crime. 8 U.S.C. 1158(b)(2)(A)(ii). It then provides a per se rule that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. 1158(b)(2)(B)(i). It also

states that "[t]he Attorney General may designate by regulation offenses that will be considered to be a [particularly serious] crime." 8 U.S.C. 1158(b)(2)(B)(ii).

As the court of appeals correctly explained, "nothing in the statute says that the Attorney General must use regulation to designate crimes as particularly serious." Pet. App. 14a. Instead, the text is permissive, providing that the Attorney General "*may* designate by regulation" offenses that will be considered particularly serious. 8 U.S.C. 1158(b)(2)(B)(ii) (emphasis added); see Pet. App. 14a.[9] The court noted that it is "a basic principle of administrative law" that the Attorney General may proceed by regulation or by case-by-case adjudication through the Board, and requiring a categorical approach would deny the agency the flexibility to determine that a crime is particularly serious in a given case even if it does not categorically qualify as such. *Id.* at 14a-15a. The court further observed that requiring the Attorney General to proceed by regulation would create "immense practical difficulties" by requiring the agency to "sift through each state's code and prospectively identify by regulation every single crime that would qualify as 'particularly serious.'" *Id.* at 15a (internal quotation marks omitted).

b. Petitioner does not allege any disagreement in the circuits on this issue. The only courts that have considered petitioner's argument have rejected it. See Pet. App. 12a-15a; *Ali*, 468 F.3d at 468-469; *Delgado*, 563 F.3d at 869-870; see also *Nethagani*, 532 F.3d at 156-157 (rejecting argument that crime must be an aggravated fel-

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[9] Petitioner is mistaken in suggesting (Pet. 24) that the *expressio unius* canon applies here; as with the withholding provision, "statutory language suggesting exclusiveness is missing." *Echazabal*, 536 U.S. at 80-81.

ony under the asylum provision). No further review is warranted for that reason alone.

Moreover, petitioner is mistaken in suggesting (Pet. 23-24) that certiorari should be granted on the second question presented if it is granted on the first because the asylum and withholding provisions "parallel[]" one another. The text of the two provisions is different, see pp. 2-3, 12-13, 19-20, *supra*, and petitioner's legal arguments regarding the two provisions are different. For example, petitioner contends that an offense must be an aggravated felony to qualify as a particularly serious crime for withholding purposes, but concedes that an offense need *not* be an aggravated felony to qualify for asylum purposes. Pet. App. 13a. Indeed, petitioner asserts that "[t]here is a stark contrast between the provision governing withholding of removal * * * and the asylum provision." Pet. 24.

3. Petitioner also argues (Pet. 26-28) that the court of appeals erred in holding that once the Board decides that an alien has committed a particularly serious crime, it need not make an independent finding that the alien is a danger to the community. Petitioner concedes that there is no disagreement in the circuits on this issue.

a. The court of appeals correctly held that "once the particularly serious crime determination is made, the alien is ineligible for withholding without a separate finding on dangerousness." Pet. App. 12a n.1 (quoting *Kofa* v. *INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (en banc)). That conclusion rested on the court's prior decision in *Kofa*, where the court applied the *Chevron* framework and upheld the Board's conclusion that no separate dangerousness finding is required. 60 F.3d at 1088-1090.

The relevant statutory text provides that an alien is ineligible for withholding of removal "if the Attorney

General decides" that "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States," 8 U.S.C. 1231(b)(3)(B), and that an alien is ineligible for asylum "if the Attorney General determines" that "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States," 8 U.S.C. 1158(b)(2)(A)(ii). The Board interpreted this language in its precedential decision in *In re Carballe*, 19 I. & N. Dec. 357 (B.I.A. 1986), modified on other grounds, *In re Gonzalez*, 19 I. & N. Dec. 682 (B.I.A. 1988). It held that the statute's text "does not require that two separate and distinct factual findings be made in order to render an alien ineligible for withholding," and that the language is best read as linking the two clauses, so that the particularly serious crime inquiry involves determining whether the alien is a danger to the community. *Id.* at 360. The Board explained that it evaluates "the nature of the conviction, the circumstances and underlying facts of the conviction, the sentence imposed, and whether the type and circumstances of the crime indicate the alien will be a danger to the community" to determine whether a crime is a particularly serious one that makes the alien a danger to the community. *Ibid.*; see *Frentescu*, 18 I. & N. Dec. at 247.

The Board's interpretation is plainly reasonable. As the court of appeals stated in *Kofa*, the statutory language does not require both a finding that the alien committed a particularly serious crime *and* a distinct finding that the alien is a danger to the community, but instead is more naturally read to say that "the alien constitutes a danger to the community because he has been convicted of a particularly serious crime." 60 F.3d at 1088.

Although the court found the statute's text "plain," it also held that, if it were ambiguous, the Board's view would be entitled to deference because "it is entirely consistent with the statute." *Id.* at 1089. Moreover, as one court of appeals explained, "[w]hen Congress added the asylum exclusion to § 1158 in 1990, the *existing* exclusion in § 1253(h)(2)(B) [for withholding of removal] *already* had been interpreted—by the [Board] and two circuits—as automatically barring withholding of deportation upon conviction of a particularly serious crime," and Congress presumably was aware of, and accepted, that interpretation. *Al-Salehi* v. *INS*, 47 F.3d 390, 394 (10th Cir. 1995).

Petitioner contends (Pet. 28) that the Board's view makes the phrase regarding the "danger to the community" superfluous, but she is mistaken because as the Board explained, that language provides the purpose behind the particularly serious crime inquiry. *Carballe*, 19 I. &. N. Dec. at 360. Petitioner is also wrong to say (Pet. 28-29) that the Board's inquiry does not consider prospective danger to the community. One factor the Board considers in assessing whether a crime is particularly serious is "whether the type and circumstances of the crime indicate the alien *will be* a danger to the community." 19 I. & N. Dec. 360 (emphasis added). As the Board explained, an alien's past crimes provide an indication of her future dangerousness, and "those aliens who have been finally convicted of particularly serious crimes are presumptively dangers to this country's community." *Ibid.* That determination is entirely reasonable.

b. Petitioner concedes (Pet. 26) that every court of appeals to consider the question has agreed with the court of appeals' holding below. See *Choeum* v. *INS*, 129

F.3d 29, 42-43 (1st Cir. 1997); *Ahmetovic* v. *INS*, 62 F.3d 48, 52-53 (2d Cir. 1995); *Kofa*, 60 F.3d at 1088-1089; *Martins* v. *INS*, 972 F.2d 657, 661 (5th Cir. 1992); *Hamama* v. *INS*, 78 F.3d 233, 240 (6th Cir. 1996); *Garcia* v. *INS*, 7 F.3d 1320, 1323 (7th Cir. 1993); *Tian* v. *Holder*, 576 F.3d 890, 897 (8th Cir. 2009); *Kankamalage* v. *INS*, 335 F.3d 858, 861 n.2 (9th Cir. 2003); *Al-Salehi*, 47 F.3d at 396; *Arauz* v. *Rivkind*, 845 F.2d 271, 275 (11th Cir. 1988). That fact counsels powerfully against further review.

Petitioner nonetheless contends (Pet. 26) that the decision below "conflicts with the decisions of other signatories to the [Refugee] Convention." She is mistaken. Those decisions construe other nations' laws, not United States law, and they therefore cannot "conflict" with the court of appeals' analysis of the pertinent provisions in 8 U.S.C. 1158 and 1231. In any event, petitioner is wrong to say that those courts take an approach that is different from that of the Board. Petitioner contends (Pet. 27) that those courts "require both a past conviction and a determination of prospective danger." As explained, the Board's precedent also accounts for future dangerousness in deciding whether a crime is particularly serious, by considering whether the alien's past crime portends future dangerousness. See p. 23, *supra*.

4. This case would be a poor vehicle to consider these issues in any event.

a. First, petitioner was granted deferral of removal under the CAT, see 8 C.F.R. 1208.17, and that decision has not been challenged in this Court. See Pet. 10 n.2 (acknowledging that fact). The grant of deferral of removal gives petitioner much the same relief she would obtain through withholding of removal to China under 8 U.S.C. 1231(b)(3). Petitioner may not be removed to China so long as it remains more likely than not that she

would be tortured if removed there. See 8 C.F.R. 1208.17(b)(1)(iv). The grant of deferral of removal thus also weighs against review in this case.

b. Second, even if this Court agreed with petitioner on the first and second questions presented, that likely would not change the result in this case, because petitioner's tax fraud conviction (as opposed to her export conviction) qualifies as an aggravated felony. The government argued to the IJ that petitioner's conviction for tax fraud was an "aggravated felony" under 8 U.S.C. 1101(a)(43)(M)(i). The IJ rejected that argument, Pet. App. 145a-147a. The government renewed the argument before the Board, A.R. 1267-1270, but the Board declined to address it because it held that an offense need not be an aggravated felony to qualify as a particularly serious crime. Pet. App. 39a-43a. That argument would be open to the Board on remand if this Court decided the first question presented in petitioner's favor.

There is ample reason to believe that the Board would find that petitioner's tax fraud offense is an aggravated felony because it is an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. 1101(a)(43)(M)(i). As this Court recently clarified in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), an offense qualifies as an aggravated felony under that provision if it has fraud or deceit as an element and the circumstances of the alien's particular case involved a loss of more than $10,000. *Id.* at 2302. Petitioner was convicted of a violation of 26 U.S.C. 7206, and fraud or deceit is a necessary element of such an offense. *E.g.*, *Kawashima* v. *Holder*, 615 F.3d 1043, 1054-1055 (9th Cir. 2010). Moreover, petitioner failed to pay more than $88,000 in taxes, so the loss amount easily exceeded the $10,000 statutory threshold. A.R. 6101-6102. The IJ

held that Section 1101(a)(43)(M)(i) excludes violations of the tax laws, Pet. App. 146a, but the text contains no such limitation, and several courts of appeals have recently rejected such a limitation. See *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 172-173 (5th Cir. 2008); *Kawashima*, 615 F.3d at 1052-1054; but see *Lee* v. *Ashcroft*, 368 F.3d 218 (3d Cir. 2004) (relied upon by the IJ below). Because petitioner's tax fraud offense likely qualifies as an aggravated felony, a decision in petitioner's favor on the first or second question presented would not change the ultimate outcome in this case.

c. Third, petitioner failed to fully brief to the Board the second and third questions presented in her petition. An alien must exhaust all challenges to a removal order with the Board before she can obtain federal court review. 8 U.S.C. 1252(d)(1); see, *e.g.*, *Asika* v. *Ashcroft*, 362 F.3d 264, 267 n.3 (4th Cir. 2004) (court of appeals lacks jurisdiction to consider an argument not made to the Board). Regarding the second question presented, in her initial appeal before the Board, and while represented by counsel, petitioner argued only that her crime was not a particularly serious one under the withholding-of-removal provision, 8 U.S.C. 1231(b)(3)(B), and did not mention the parallel asylum provision. A.R. 1348. In her motion for reconsideration, petitioner asserted in general terms that her offense did not qualify as a particularly serious crime under both the asylum and withholding provisions, A.R. 1143, but she only provided argument regarding the withholding provision, A.R. 1144-1146. See Pet. C.A. Br. 40-41; Pet. C.A. Reply Br. 2-4. Petitioner did not argue that an offense must be an aggravated felony or designated as a particularly serious crime by regulation to bar her eligibility for

asylum, or even mention the relevant text of the asylum provision.

Regarding the third question presented, petitioner did not make any argument in her appeal briefs to the Board about whether the asylum or withholding statute require a separate determination about future dangerousness. Instead, she accepted that the *Frentescu* factors controlled whether she was ineligible for withholding of removal because of her crime. A.R. 1347-1348. In her motion for reconsideration, petitioner argued that she was not a danger to the community under the last *Frentescu* factor, A.R. 1153-1154, but she did not argue that even if her crime was a particularly serious one, the Board was required to make a further finding of future dangerousness.

Because petitioner failed to make those arguments to the Board, the Board did not expressly address them in its opinions. See Pet. App. 19a-29a, 30a-46a. The court of appeals did ultimately address the arguments. *Id.* at 12a-15a & n.2. Nonetheless, petitioner's failure to brief the issues in any significant respect before the Board makes this case a poor candidate for further review, because the Court would be deprived of the Board's views, and because there would be a serious question as to whether the federal courts have jurisdiction over the claims at all.

d. Finally, even if the Court accepted petitioner's view on the third question presented, the result would be the same, because the seriousness of petitioner's crime shows that she presents a danger to the United States. Petitioner's crime was "serious, morally reprehensible, and creat[ed] potential future risks" to the United States. Pet. App. 149a. Petitioner "placed her desire for financial gain ahead of the security interests of the

United States" and endangered national security by repeatedly selling "sophisticated microprocessors with well-known military applications" to companies in China that were known to be affiliated with the Chinese military. *Id.* at 16a-17a. She continued that illegal activity even after the United States secured her release from China, and the only reason she ceased her illegal activity is because United States law enforcement authorities discovered it. *Id.* at 23a-24a, 42a, 118a-119a; see also p. 5 & n.1, *supra* (petitioner's post-arrest activities). Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010

Supreme Court, U.S.
FILED
DEC 15 2010
OFFICE OF THE CLERK

No. 10-130

IN THE

Supreme Court of the United States

ZHAN GAO,

Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

1. The Government acknowledges, BIO 17, that this case presents the precise question that this Court granted certiorari to decide in *Ali v. Achim*, 551 U.S. 1188 (2007): whether, for purposes of withholding of removal, "particularly serious crimes" are limited to aggravated felonies. The parties in *Ali* voluntarily dismissed the case before oral argument, leaving the circuit conflict on that important and recurring question unresolved. 552 U.S. 1085 (2007).

The Government does not deny the existence of the circuit split. Instead, it hypothesizes that the split does not "now" warrant review because the Third Circuit might reverse itself in light of the Board of Immigration Appeals' (BIA) reiteration of its contrary position in *In re N-A-M-*, 24 I.& N. Dec. 336, 338 (2007). But as the petition explained, Pet. 15, there is no prospect that the Third Circuit will reverse course. The Third Circuit decided *Alaka* in the face of the BIA's "consistent practice" to the contrary. *See N-A-M-*, 24 I. & N. Dec. at 338-39 (explaining that the BIA had issued "numerous decisions" over the years reflecting its "understanding that the classification of an offense as a 'particularly serious crime' is not limited to offenses that are aggravated felonies").

The Government's brief in opposition in *Ali v. Achim* confirms that the Board's decision in *N-A-M-* was a continuation of past practice, not a "watershed" moment that would cause the Third Circuit to reverse course. In urging the Court to deny review in that case, the Government made precisely the same argument that it makes now: the Board's interpretation is entitled to *Chevron* deference, and

certiorari is not warranted because the Third Circuit in *Alaka* had failed to consider agency deference entirely. *Compare* Gov't BIO 11, 14-15, *Ali v. Achim* (No. 06-1346) (July 11, 2007) *with* BIO 13, 17-18. The Government's brief in *Ali* also acknowledged that the Board's interpretation was longstanding. *See* Gov't BIO 11, *Ali* (citing *In re L-S-*, 22 I. & N. Dec. 645, 651 (B.I.A. 1999)).

In any event, the Third Circuit's holding that the statutory text is unambiguous disposes of the Government's contention that the court of appeals would be compelled to revisit its position under *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), which requires no deference in such a case: "If the intent of Congress is clear, that is the end of the matter." The Third Circuit regarded the statute as establishing unambiguously that the class of "particularly serious crimes" is limited to aggravated felonies: "The *plain language and structure* (*i.e.*, context) of the statute indicate that an offense *must be* an aggravated felony to be sufficiently 'serious'" to deny withholding of removal. *Alaka v. Attorney General*, 456 F.3d 88, 104 (3d Cir. 2006) (emphases added). Because the statute remains unchanged, nothing in *N-A-M-* would alter that settled conclusion.

Lest there be any doubt, the Third Circuit recently reiterated that conclusion, specifically acknowledging the BIA's contrary ruling in *N-A-M-* (which the Government had cited repeatedly in its briefs in that case) but reaffirming that "[i]n the withholding of removal context, a particularly serious crime is an aggravated felony for which the alien was sentenced to five years imprisonment or an

aggravated felony that the Attorney General deems a particularly serious crime." *Quiceno v. Attorney Gen. of the United States*, 304 Fed. Appx. 40, 43-44 (3d Cir. 2008).[1]

The Government's contention that the Third Circuit would now defer to the BIA fails for the further reason that the BIA rested its decision in *N-A-M-* on a supposed "plain reading of the Act," *In re N-A-M-*, 24 I. & N. Dec. 336, 338 (2007), which the Government seemingly acknowledges is not subject to deference. *See* Pet. 22-23; *Negusie v. Holder*, 129 S. Ct. 1159, 1166-67 (2009) (holding that the BIA, in considering itself bound by the "plain language" of a statute and a court decision, "has not yet exercised its *Chevron* discretion"); *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006). The very fact that the BIA and the Third Circuit read the same text to compel opposite conclusions strongly supports this Court's intervention to resolve the impasse.

2. Only the Third Circuit's reading of the withholding of removal statute properly accounts for the statute's text and Congress's intent. As the petition explains, the statute specifies that one type of offense is *per se* "particularly serious" for purposes of withholding of removal: an "aggravated felony (or felonies) for which the alien has been sentenced to an

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[1] The Third Circuit did so notwithstanding the Government's contention that "the Attorney General may also determine that any aggravated felony that resulted in a sentence of less than five years qualifies as particularly serious." Gov't Br. 9, *Quiceno v. Mukasey* (3d Cir. Mar. 20, 2008).

aggregate term of imprisonment of at least 5 years." 8 U.S.C. § 1231(b)(3)(B). *See* Pet. 25. The statute then confers on the Attorney General a specified, limited authority to designate *additional aggravated felonies* as "particularly serious": "The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." *Id.*

That statutory structure – in which the Attorney General's authority is directly tied to the designation of aggravated felonies as particularly serious crimes in "[t]he previous sentence" – is completely inconsistent with the Government's assertion that the withholding provision broadly "grants the Attorney General the discretionary authority to decide if a crime is particularly serious with the only limitation being that some aggravated felonies *are per se* 'particularly serious,'" BIO 13. The Government's position that it may deem *any* crime "particularly serious" renders the phrase "notwithstanding the length of sentence imposed" meaningless and deprives of all force Congress's designation of aggravated felonies as particularly serious crimes. Under the Government's reading, the only check on the Attorney General's designation is case-by-case litigation over what sorts of crimes are "particularly serious" – an understanding that this Court's Eighth Amendment proportionality jurisprudence suggests courts are ill-equipped to conduct.

Moreover, the Government's construction of the withholding provision should be rejected as contrary to Congress's intent because it places the United

States in violation of its treaty obligations. The Government does not dispute that Congress enacted the Refugee Act of 1980 to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citing H.R. Rep. No. 96-608, at 9 (1979)), and that it intended the Act's two *nonrefoulement* exceptions to be "construed consistent with the Protocol." H.R. Conf. Rep. No. 96-781, at 20 (1980). Nor does the Government dispute that, under the Protocol, a "particularly serious crime" is the equivalent of "a capital crime or a very grave punishable act." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 155, U.N. Doc. HCR/1P/4/Eng/Rev.2 (1979) (1992 ed.).

The Government asserts, however, that because the Refugee Convention and Protocol "do not define what types of crimes are sufficiently serious to qualify as particularly serious crimes," Congress possesses "wide latitude" to define that category for itself. BIO 16 n.8. That logic merely begs the question of what Congress in fact intended. Petitioner argues not that the statute is invalid because it conflicts with the Protocol, but instead that the statute should be construed to be consistent with the Protocol. *See* Pet. 19 (citing H.R. Rep. No. 96-781, at 20 (1980)). This Court should not assume that Congress intended *sub silentio* to authorize the Attorney General to adopt a reading of "particularly serious crime" contrary to the Protocol.

3. There is no merit to the Government's contention that this case is not a suitable vehicle for this Court's review because of the possibility that on remand petitioner's tax conviction might be deemed an "aggravated felony." *See* BIO 25. At the urging of the Government, this Court routinely grants review in cases in which on remand the petitioner might not ultimately prevail. *E.g.*, *Abbott v. Abbott*, 130 S. Ct. 1983, 1997 (2010) (ruling in petitioner's favor on the question presented but indicating that "[t]he proper interpretation and application of these and other exceptions [to the Hague Convention on the Civil Aspects of International Child Abduction] . . . may be addressed on remand"); U.S. Cert. *Amicus* Br. 21, *Abbott v. Abbott*, 130 S. Ct. 1983 (No. 08-645) (May 2009). And, in any event, it is hardly "likely," BIO 26, that petitioner's tax fraud conviction is an "aggravated felony." The Immigration Judge concluded that it is not. Pet. App. 146a. Neither the BIA nor the Fourth Circuit reached this issue, *id.* 43a, 12a, and (as the Government acknowledges) other courts of appeals have given conflicting guidance on this issue, *see* BIO 26 (citing cases).

Nor does Gao's entitlement to deferral of removal under the Convention Against Torture render this case a poor vehicle. Although the Government posits that deferral of removal provides Gao with "much the same relief" as withholding, BIO 24, that assertion is belied by the Government's own regulations, which make clear that deferral of removal provides "a less permanent form of protection than withholding of removal . . . [because it] is more easily and quickly terminated if it becomes possible to remove the alien consistent with" the Convention. *Regulations*

Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (1999). The Government also ignores that asylum, which Gao also seeks, is a still more desirable form of relief, as it would allow Gao to remain in the United States permanently. 8 C.F.R. §§ 208.14(e), 208.16(f), 208.22.

4. In fact, this case presents an ideal vehicle for the Court to resolve not only the question whether "particularly serious crimes" are limited to aggravated felonies for purposes of withholding, but also two closely related questions: what constitutes a "particularly serious crime" for purposes of asylum, and whether a non-citizen seeking withholding and asylum is entitled to a prospective, individualized determination about whether she constitutes a danger to the community. As the petition explains, the statutory provision governing withholding directly parallels the provision governing asylum. Pet. 23. Both are rooted in the identical requirement that a non-citizen is ineligible for relief if, "having been convicted by a final judgment of a particularly serious crime," she is "a danger to the community." Moreover, because the statutes so closely mirror one another, each statute's definition of what constitutes a "particularly serious crime" informs the other. *Id.*

Like the withholding provision, Section 1158(b)(2)(B)(iii) indicates that one category of crimes – here, aggravated felonies – is *per se* particularly serious for purposes of asylum. The statute then further provides that "the Attorney General may designate additional crimes" as particularly serious "by regulation." The Government argues that Congress's use of the word "may" rather than "must" suggests an intent to provide the Attorney General

with the authority to designate additional offenses as "particularly serious" either by regulation or on a case-by-case basis. BIO 20. But the Attorney General is already presumed to have the authority to choose between two kinds of rulemaking, *see* Pet. App. 14a; the only reason for Congress to expressly identify designation "by regulation" would be to *limit* the Attorney General's options. As with its argument about withholding, the Government's construction would strip a portion of the statute of all meaning, rendering it surplusage. Pet. 24.[2]

Nor would requiring the Attorney General to proceed "by regulation" impose an unjustifiable burden. *But see* BIO 20. Rather, the Attorney General could satisfy the statute by issuing regulations designating categories of non-aggravated felonies as particularly serious crimes, just as Congress already has done by statute for "aggravated felonies." *See, e.g.*, 8 U.S.C. § 1101(a)(43). Alternatively, the Attorney General could designate by regulation particular factors that would render a non-aggravated felony a particularly serious crime for asylum purposes. It is thus notable that the Government makes no serious effort to contest the

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[2] The Fourth Circuit properly rejected the Government's argument that petitioner failed to exhaust her asylum claim, *see* BIO 26, concluding that Gao "repeatedly challenged" whether her export control conviction constituted a particularly serious crime for purposes of asylum in her motion to the BIA for reconsideration, Pet. App. 13a n.2. Of course, Gao would have had no reason to raise this issue in her initial appeal to the BIA, as the Immigration Judge had ruled in her favor on this point.

petition's arguments regarding the importance of notice of deportation consequences in withholding and asylum cases – particularly those, such as petitioner's, which involve a plea bargain. *See* Pet. 21. The Government's construction runs directly counter to these considerations, as it fails to provide a non-citizen convicted of (or considering a possible plea bargain for) a non-aggravated felony with any guidance as to whether his crime will be considered particularly serious. Any "burden" that arises from that process is the necessary consequence of Congress's determination to subject the Attorney General's discretion to the regulatory process.

5. The petition demonstrated that certiorari is warranted, as in *Abbott*, *supra*, to resolve a conflict between the United States and other Protocol signatories over the construction of the "danger to the community" requirement. As the petition shows, courts in Canada, Australia, and the United Kingdom all require two independent findings – both that a non-citizen has been convicted of a particularly serious crime and that she constitutes a "danger to the community" in the future. *See* Pet. 27 (citing cases).

The Government contends only that the BIA does not "take an approach that is different from" other Protocol signatories, BIO 24, because it considers the predictive value of offenses when it decides whether to categorize a specific type of offense as "particularly serious." BIO 23. But scholars have recognized that the BIA's position "ignore[s] the predominant international law in this area" by, among other things, "conflating the two independent requirements of 'conviction of a particularly serious crime' and

'danger to the community' through the use of a *per se* rule." Kathleen M. Keller, *A Comparative and International Law Perspective on the United States (Non)compliance with Its Duty of Non-Refoulement*, 2 Yale Hum. Rts. & Dev. L.J. 183, 207 (1999).

The Government's construction of the "danger to the community" provision also suffers from the same flaw as its proposed construction of the asylum and withholding provisions: it renders superfluous a portion of the plain text. The Government contends that the "danger to the community" clause has meaning because it "provides the purpose behind the particularly serious crime inquiry"; in the BIA's view, "an alien's past crimes provide an indication of her future dangerousness," such that aliens "convicted of particularly serious crimes are presumptively dangers to this country's community." BIO 23. Not only does the Government fail to grapple with the petition's arguments regarding the plain text, Pet. 28-29, but it also overlooks that the statute requires the Attorney General to "decide[]" or "determine[]" whether an alien "is" or "constitutes" a danger to the community – each verb in the present tense. By contrast, the phrase "having been convicted of a particularly serious crime" is in the past tense, thereby confirming that the present-tense verbs "decides" and "determines" must refer to the "is a danger to the community" clause and require a separate dangerousness determination. Read the Government's way, the statute would require the Attorney General to "decide" something that has already "been" decided in the past, which is no decision at all.

Finally, the Government suggests that even if the withholding and asylum statutes require a prospective, individualized determination of danger to the community, Gao would still be ineligible for such relief because she is a danger to the United States. BIO 27-28.[3] No judge or tribunal, however, has made any such determination; that issue should be litigated on remand.

To the extent that the Government is suggesting that Gao is ineligible because she is somehow a threat to national security, that is not a reason for denying withholding or asylum under the provisions at issue here. Sections 1231(b)(3)(B)(ii) and 8 U.S.C. § 1158(b)(2)(A)(ii) require a determination that the non-citizen is a "danger to the *community of* the United States." The Government does not, and did not below, seriously argue that Gao posed a danger to the community in the future,[4] no doubt because it recognized the futility of such an argument in the face of the recommendation by former U.S. Attorney Paul McNulty that Gao be permitted to remain in the

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[3] The Government also argues, for the first time in this case, that Gao has not exhausted her administrative remedies with regard to her "danger to the community" argument. BIO 27. This contention has not only been waived but it is wrong: Gao's briefing in the BIA argues that a "*de facto*" finding that she was a "danger to the community" because she had been convicted of a "particularly serious crime" was "nothing more than a circular argument." A.R. 1153.

[4] Rather, the Government argued only that because Gao was convicted of a particularly serious crime, she must be a danger to the community. A.R. 1282.

United States. *See* Pet. App. 111a (statement of Judge Ellis).

To be sure, other provisions of the INA deal with threats to national security. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(iv) (asylum not available when "there are reasonable grounds for regarding the alien as a *danger to the security of the United States*") (emphasis added); 8 U.S.C. § 1231(b)(3)(B)(iv) (same for withholding). If indeed the Government asserts that petitioner poses such a national security threat, petitioner's case would best be addressed under the appropriate statutory provision on remand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 15, 2010